

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

76-1302

In The
United States Court of Appeals
For The Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

-against-

FELIX ORTIZ,

Appellant.

*On Appeal from the United States District Court For the
Southern District of New York.*

**APPENDIX IN BEHALF OF APPELLANT
FELIX ORTIZ**

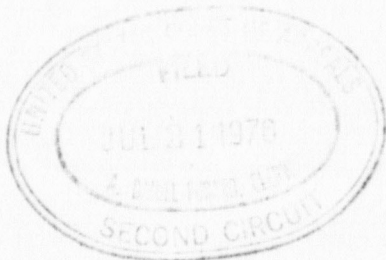
FRANK A. LOPEZ

Attorney for Appellant

31 Smith Street

Brooklyn, New York 11201

(212) 237-9500



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TABLE OF CONTENTS

	Page
Docket Entries	1a
Indictment (Docket No. 75 Cr. 1155) (Filed November 25, 1975)	2a
Judgment (Filed April 19, 1976)	5a
Stipulation Preserving Right to Appeal . . .	6a
Notice of Appeal (Filed April 29, 1976) . . .	8a
Affidavit of Search Warrant	10a
Transcript of Evidentiary Hearing on De- fendant-Appellant's Motion to Suppress Evidence Dated March 10-11, 1976	13a

WITNESSES

Donald Alfred Klopfer:	
Direct	20a
Cross	62a
Redirect	86a
Recross	88a
Angel Rodriguez:	
Direct	89a
Cross	102a

DOCKET ENTRIES

1a

November 25th, 1975

Indictment filed. Defendant Ortiz enters plea of Not Guilty. Case assigned to Hon. Thomas P. Griesa, D.J.

March 1st, 1976

Defendant Ortiz files Motion to Suppress Evidence.

March 10th, 1976

Evidentiary Hearing on Motion to Suppress Evidence before Griesa, D.J. Motion denied.

March 11th, 1976

Defendant enters plea of Guilty to Count 2, charging substantive crime of possession of narcotics with intent to distribute, 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A), with stipulation preserving right to appeal from denial of motion to suppress evidence.

April 19th, 1976

Defendant Ortiz sentenced to custody of the Attorney General for period of Five years and special parole of three years, concurrent with New York state sentence defendant Ortiz presently serving. Count 1 is dismissed.

April 29th, 1976

Notice of Appeal filed.

INDICTMENT (Docket No. 75 Cr. 1155)
(Filed November 25, 1975)

2a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-v- :

INDICTMENT

VICTORIANO BONEZ PEREZ,
FELIX ORTIZ and
ROBERTO GONZALEZ,

: 75 Cr.

: Defendants. :
-----x

The Grand Jury charges:

1. From on or about the 1st day of November, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

VICTORIANO BONEZ PEREZ,
FELIX ORTIZ and
ROBERTO GONZALEZ,

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

BEST COPY AVAILABLE

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

(1) On or about November 13, 1975, the defendant FELIX ORTIZ went to the vicinity of South 5th Street and Keap Street, Brooklyn, New York.

(2) On or about November 13, 1975, the defendant FELIX ORTIZ, while in the vicinity of South 5th Street and Keap Street, Brooklyn, New York removed a brown paper bag from a Ford Thunderbird, License Number 357XOA N.Y.

(3) On or about November 17, 1975, the defendant FELIX ORTIZ went to the vicinity of 54th Street and 7th Avenue, New York, New York.

(4) On or about November 17, 1975, the defendants FELIX ORTIZ, RICOBERTO GONZALEZ and VICTORIANO BOMEZ PEREZ met in the vicinity of 55th Street and 7th Avenue, New York, New York.

(5) On or about November 17, 1975, in the vicinity of 56th Street and 7th Avenue, New York, New York, the defendants VICTORIANO BOMEZ PEREZ and RICOBERTO GONZALEZ delivered a brown paper bag to FELIX ORTIZ.

(6) On or about November 17, 1975, the defendant FELIX ORTIZ drove his car to the vicinity of the Wilton Tunnel, 34th Street and Second Avenue, New York, New York.

(7) On or about November 17, 1975, in the vicinity of the Wilton Tunnel, 34th Street and Second Avenue, New York, New York, the defendant FELIX ORTIZ had in his possession approximately 40 ounces of heroin.

(8) On or about November 17, 1975, the defendants VICTORIANO BOMEZ PEREZ and RICOBERTO GONZALEZ went to the vicinity of 12th Street and St. Nicholas Avenue, New York, New York.

USA-33s-528 - IND/INF - Possession With Intent to Dist. Narc. Drug
Rev. 5-27-72 (Succeeding Count)

COUNT 11

The Grand Jury further charges:

On or about the 17th day of November, 1975
in the Southern District of New York,
JOHN J. DOLAN, JR.
JAMES J. DOLAN
RICHARD J. DOLAN
the defendants, unlawfully, intentionally and knowingly
did possess with intent to distribute, a Schedule I
narcotic drug controlled substance, to wit,
approximately 1753.07 grams of heroinly material.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A);
Title 18, United States Code, Section 2)

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGMENT (Filed April 19, 1976)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

United States of America vs.

DEFENDANT

FELIX ORTIZ

DOCKET NO.

75 Cr 1155

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government Frederick Davis
the defendant appeared in person on this date

MONTH DAY YEAR
April 19, 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Frank Lopez, Esq.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☐ GUILTY.

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of unlawfully, intentionally and knowingly possessing with intent to distribute, a Schedule I narcotic drug controlled substance as charged in Count 2.

21, USC, §812, 841(a)(1) and 841(b)(1)(A)
18, USC, §2

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FIVE YEARS. Pursuant to Section 841, USC, Title 21, defendant to be placed on Special Parole for a period of THREE YEARS to commence upon expiration of confinement. This sentence is to run concurrent with the New York State sentence defendant is presently serving.

Count 1 is dismissed upon motion by defendant's counsel with the consent of the Government.

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

COMMITMENT
RECOMMEN-
DATION

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

FILED BY

U.S. District Judge

Thomas P. Simon

U.S. DISTRICT COURT
FILED
APR 19 1976
S.D. OF N.Y.

FILED APR 19 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA :

- v - :

STIPULATION

FELIX ORTIZ,

: 75 Cr. 1155 (TPG)

Defendant. :

WHEREAS, Indictment 75 Cr. 1155 was filed in the Southern District of New York against the defendant Felix Ortiz on November 25, 1975, charging him with violations of 21 U.S.C. §§812, 841, 846; WHEREAS, the defendant Felix Ortiz moved on February 25, 1976 before the District Court for the Southern District of New York to suppress as evidence against him narcotic controlled substances on the ground that these drugs had been seized in violation of the Fourth Amendment of the United States Constitution and also moved to suppress as evidence against him certain post-arrest statements on the ground that they were taken in the violation of the Constitution; WHEREAS, the said motion by defendant Ortiz was denied by the Honorable Thomas P. Griesa, United States District Judge for the Southern District of New York, after a hearing held on March 10, 1976; WHEREAS, the defendant Felix Ortiz desires to plead guilty to one count of the charges outstanding against him in the Southern District of New York upon which the maximum penalty is \$25,000 fine and 15 years in jail, to be followed by three years special parole, while preserving his right to appeal the District Court's denial of this motion to suppress; and WHEREAS, the Government has agreed to the procedure wherein the defendant Felix Ortiz pleads guilty to the charge outstanding against him on condition that the suppression issue be preserved for appeal;

FTD:slc
75-3860
M-15

7a

IT IS HEREBY STIPULATED AND AGREED by and between the United States Attorney for the Southern District of New York, Frederick T. Davis, Assistant United States Attorney of Counsel, and the defendant Felix Ortiz and his counsel, Frank Lopez, Esq. as follows:

(1) The defendant Felix Ortiz agrees to plead guilty to one count of the indictment 75 Cr. 1155 on the express condition that the issue raised by him on his motion of February 25, 1976 to suppress certain evidence against him, which motion was denied by the District Court on March 10, 1976, be preserved for appeal to the higher Courts.

(2) The Government expressly agrees that the guilty plea shall be entered by the defendant Felix Ortiz on the condition that the denial of his above described motion to suppress evidence against him be preserved for appeal, and that if the decision of the District Court denying the said motion to suppress evidence against him is reversed on appeal the defendant may withdraw his guilty plea entered to the above described indictment.

(3) It is further agreed between the defendant Felix Ortiz and the Government that this stipulation shall be presented to the Honorable Thomas P. Criesa, United States District Judge, for his acceptance prior to the taking of the above described guilty plea.

Dated: New York, New York

March , 1976.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By:

FREDERICK T. DAVIS
Assistant United States Attorney

FELIX ORTIZ
Defendant

FRANK LOPEZ
Attorney for Defendant Ortiz

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

FELIX ORTIZ,

Defendant-Appellant.

Docket No. 75 Cr. 1356

NOTICE OF APPEAL

-----x

S I R S :

PLEASE TAKE NOTICE that the defendant-appellant herein hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction rendered against him on April 19th, 1976, and imposed by the Honorable THOMAS F. GRIESA, a Judge of the United States District Court for the Southern District of New York, and sentencing the defendant-appellant herein to a term of Five (5) years concurrent with a present New York State sentence, and a special parole of three (3) years, on his conviction for Violation of 21 U.S.C. §§ 812, 841, 846, and from each and every part of said judgment.

DATED: Brooklyn, New York, April 28th, 1976.

Yours, etc.,

FRANK A. LOPEZ
Attorney for Defendant-Appellant
FELIX ORTIZ
31 Smith Street
Brooklyn, New York 11201
Tel (212) 237-9500

TO:

HONORABLE ROBERT B. FISKE, JR.
United States Attorney
Office of the United States Attorney
One St. Andrews Plaza
New York, New York 10007

CLERK
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

RJD:FL-E:ald
F# 753758AFFIDAVIT OF SEARCH WARRANT
United States District Court
FOR THE

10a

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Docket No.

vs.

Case No.

SAFE DEPOSIT BOX NO. 5582, LOCATED
AT THE MANUFACTURER'S HANOVER
TRUST COMPANY 37-29 JUNCTION
BOULEVARD, CORONA, NEW YORK LEASED
IN THE NAME OF FELIX ORTIZ,

SEARCH WARRANT

Defendant

To ANY SPECIAL AGENT OF THE DRUG ENFORCEMENT ADMINISTRATION

Affidavit(s) having been made before me by Special Agent John P. Mullen

that he has reason to believe that { ~~on the person of~~
on the premises known as }MANUFACTURER'S HANOVER TRUST COMPANY, 37-29 JUNCTION BOULEVARD,
CORONA, NEW YORK, WITHIN SAFE DEPOSIT BOX NO. 5582 LOCATED THERE-
AT, WHICH SAFE DEPOSIT BOX IS LEASED IN THE NAME FELIX ORTIZ.

in the Eastern District of New York

there is now being concealed certain property, namely

here describe property

A quantity of United States Currency, which currency is and consists
of the illegal proceeds of the unlawful distribution of narcotic drug
controlled substances in violation of Title 21, United States Code,
Section 841(a)(1)and as I am satisfied that there is probable cause to believe that the property so described is being
concealed on the person or premises above described and that grounds for application for issuance of the
search warrant exist as stated in the supporting affidavit(s).You are hereby commanded to search within a period of _____
(not to exceed 10 days) the person or place named for the property specified, serving this warrant
and making the search { in the daytime (6:00 a.m. to 10:00 p.m.) } and if the property be found
at any time in the day or night*
there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written
inventory of the property seized and promptly return this warrant and bring the property before
_____ as required by law.

Federal Judge or Magistrate

File Copy
CT 75-C 338

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

AFFIDAVIT FOR
SEARCH WARRANT

- against -

SAFE DEPOSIT BOX NO. 5582,
LOCATED AT THE MANUFACTURER'S
HANOVER TRUST COMPANY 37-29
JUNCTION BOULEVARD, CORONA,
NEW YORK, LEASED IN THE NAME
FELIX ORTIZ,

21 U.S.C. 8841(a) (1)

Defendants.

EASTERN DISTRICT OF NEW YORK, SS:

JOHN P. MULLEN, being duly sworn, deposes and says
that he is a Special Agent of the Drug Enforcement Administra-
tion, duly appointed according to law and acting as such.

Your deponent has reason to believe that there is
presently being concealed within the SAFE DEPOSIT BOX NO.
5582, LOCATED AT THE MANUFACTURER'S HANOVER TRUST COMPANY,
37-29 JUNCTION BOULEVARD, CORONA, NEW YORK, LEASED IN THE
NAME FELIX ORTIZ a quantity of United States Currency, which
currency is and consists of the illegal proceeds of the un-
lawful distribution of narcotic drug controlled substances
in violation of Title 21, United States Code, Section 841 (a) (1).

The source of your deponent's information and the
grounds for his belief are:

(1) Arrest on November 17, 1975 of one FELIX ORTIZ
by members of the New York Drug Enforcement Task Force (here-
inafter NYDET) for violations of the federal narcotics laws.

(2) Statement made to members of the NYDET by
FELIX ORTIZ, after his arrest, in which he admitted his role
in the illicit trafficking of drugs.

(3) Statement made by FELIX ORTIZ to members of
the NYDET in which he stated that he is the lessor of
SAFE DEPOSIT BOX NUMBER 5582, LOCATED IN THE MANUFACTURER'S
HANOVER TRUST COMPANY BRANCH, 37-29 JUNCTION BOULEVARD, CORONA,

New York and that, further, there is currently approximately Seven Thousand (\$7,000.00) Dollars in United States Currency secreted therein, which currency constitutes proceeds of or is in illegal dealings in narcotic drugs.

(4) Signed statement by the defendant FELIX ORTIZ, dated "11/17/75" which reads as follows:

"I FELIX ORTIZ give permission to Don Klonfer and or Bill Burbage of the NYJTF to open my safe box N. 5582 located at Manufacturers Hanover Trust Co., Junction Blvd., between 37 and 38 Avenue, Queens,

/s/ Felix Ortiz

Witnessed

/s/ Harry Batchelder
/s/ Donald A. Klonfer
/s/ William Burbage

WHEREFORE, your deponent respectfully requests that a search warrant issue to your deponent and to any other Special Agent of the Drug Enforcement Administration, authorizing him or them to open SAFE DEPOSIT BOX NO. 5582, LOCATED AT THE MANUFACTURER'S HANOVER TRUST COMPANY, 37-29 JUNCTION BOULEVARD, CORONA, NEW YORK, LEASED IN THE NAME FELIX ORTIZ, and therein to search for and seize the aforementioned United States Currency, constituting the proceeds and evidence of violations of Title 21, United States Code, 8841(a)(1).

Sworn to before me this
16th day of November 1975.

VINCENT A. ORTIZ

United States Magistrate
Eastern District of New York

A TRUE COPY.

TRANSCRIPT OF EVIDENTIARY HEARING ON DEFENDANT-APPELLANT'S
MOTION TO SUPPRESS EVIDENCE DATED MARCH 10-11, 1976

13a

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA :

5 vs. :

6 VICTORIANO BOHEZ PEREZ, :
7 FELIX ORTIZ and :
8 RIGOBERTO GONZALEZ, :

9 Defendants. :
10 -----XX

Before:

HON. THOMAS P. GRIESA,
District Judge.

75 Cr. 1155

11 New York, March 10, 11, 1976
12
13
14
15
16
17
18
19

20 STENOGRAPHER'S MINUTES
21
22
23
24
25

1 MD

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 United States of America

6 v.

75 Cr. 1155

7 Victoriano Bohez Perez,
8 Felix Ortiz and
9 Rigoberto Gonzalez,

10 Defendants.

11 -----x

12 March 10, 1976
2:30 p.m.

13 BEFORE:

14 HON. THOMAS P. GRIESA,

15 District Judge.

16 APPEARANCES:

17 Robert B. Fiske, Jr., Esq.,
United States Attorney
18 Frederick T. Davis, Esq.,
Assistant United States Attorney

19 Edward Panzer, Esq.,
Attorney for Defendant Perez

20 Frank Lopez, Esq.,
21 Attorney for Defendant Ortiz

22 Alvin S. Michaelson, Esq.,
23 Attorney for Defendant Gonzalez

24 ALSO PRESENT:

25 Norma Seltzer,
Interpreter

1 MD

2 (Case called.)

3 MR. PANZER: Mr. Ortiz is ready, your Honor.

4 MR. LOPEZ: Mr. Perez is ready.

5 MR. MICHAELSON: Ready on behalf of Mr.

6 Gonzalez.

7 MR. DAVIS: The government is ready.

8 THE COURT: I understand we have a suppression
9 motion at the outset; is that correct?

10 MR. DAVIS: That is correct, your Honor. There
11 is a little complication I think we can clear up as to
12 exactly who is moving to suppress what.

13 THE COURT: Okay. Why don't you let the defense
14 lawyers make their motions on the record.

15 MR. LOPEZ: Your Honor, my name is Frank Lopez,
16 and I represent the defendant Felix Ortiz.

17 Felix Ortiz has moved to suppress certain
18 evidence seized pursuant to a warrantless arrest on November
19 17, 1975.

20 THE COURT: Could I interrupt you a minute?
21 I think we have an interpreter.

22 MS. SELTZER: Yes, your Honor.

23 THE COURT: Whom we better swear.

24 (Norma Seltzer sworn as interpreter.)
25

1 MD

3

2 BY THE COURT (Of the Interpreter)

3 Q What is your name?

4 A Norma Seltzer.

5 Q And you are interpreting for whom?

6 A For both gentlemen here.

7 Q What are their names?

8 A Mr. Gonzalez and Mr. Perez.

9 Q Have you spoken to them?

10 A Yes, your Honor.

11 Q And they understand you, and you understand
12 them?

13 A Yes, your Honor.

14 Q And this is for Perez and Gonzales, right?

15 A Right, your Honor.

16 THE COURT: Go ahead.

17 MR. LOPEZ: We are concerned, your Honor, with
18 a warrantless arrest on November 17, 1975, of the defendant
19 Ortiz.20 The motion seeks to suppress three categories
21 of items. There was in fact, pursuant to that arrest on
22 November 17th, which was without authority or warrant but
23 pursuant apparently to probable cause in the belief of the
24 government --

25 MR. PANZEP: I would like to interrupt. There

1 md

2 are agents in the courtroom. I would like the agents
3 excluded while we are making opening argument because they
4 may testify in this case.

5 MR. LOPEZ: The police had made certain prior
6 observations, your Honor --

7 THE COURT: What is your motion?

8 MR. LOPEZ: The motion is to suppress the drugs
9 that were seized in the automobile at the time of the
10 arrest, the drugs seized from the person of Ortiz, his
11 post arrest statements, and also to move to vacate a search
12 warrant of a safe deposit box which was obtained as a
13 result of his arrest and the so-called proceeds of narcotics
14 which was United States currency which was found in that
15 safe deposit box.

16 These are the items we seek to suppress.

17 THE COURT: Let me make a note of that, and we
18 will go on to the next item.

19 What other motions?

20 MR. LOPEZ: This is the only motion pretrial.

21 THE COURT: Then let's hear from any other
22 defendants who wish to make motions.

23 MR. MICHAELSON: Your Honor, Alvin Michaelson
24 on behalf of Mr. Gonzalez, who is present in court.

25 Your Honor, we are moving to suppress the

1 md

2 following: The results of the fruits of the warrantless
3 arrest and warrantless search of my client on November 17,
4 1975 when certain items were seized as a result of that
5 particular warrantless arrest and warrantless search; and
6 also an alleged statement taken from my client, Mr. Gonzalez,
7 subsequent to that particular warrantless arrest and
8 warrantless search.

9 THE COURT: Now, Mr. Panzer.

10 MR. PANZER: I represent Mr. Perez. I am joining
11 the motion with co-counsel, namely, because of the fact
12 there is a conspiracy charged and all three will be tried
13 together. I believe under those circumstances they are also
14 charging my client with possession with intent to distribute
15 the contraband in this case.

16 Based on that, I am joining the motion of co-
17 counsel.

18 MR. MICHAELSON: With due respect, I also am
19 joining in the motion of Mr. Lopez on behalf of Mr. Ortiz
20 based on the same ground, that there is a conspiracy
21 charged.

22 THE COURT: How do we proceed? Does the
23 government now put on proof?

24 MR. DAVIS: May I say first two things. Based
25 on what Mr. Panzer said about the defendant Perez, I have

1 md

6

2 stated to Mr. Panzer the government doesn't intend to
3 introduce any statements made by Perez or anything seized
4 from him, so while he says he joins the motion I say he has
5 no standing to move to suppress anything.

6 THE COURT: I don't think we have to go into
7 that.

8 MR. DAVIS: On the issue of the motion, I am
9 a little surprised with respect to one thing Mr. Lopez
10 said, and that is his seeking to suppress the contents of
11 a safe deposit box opened with a warrant.

12 THE COURT: His theory is all the motions hang
13 on the validity of the arrest. Basically, both lawyers are
14 saying the fruits of those arrests, whether they led to
15 seizures or led to affidavits seeking warrants, all of that
16 falls if the arrests are invalid.

17 The thing to do is to hear the evidence about
18 the reasons for the arrests and then sort out what results
19 from that.

20 MR. LOPEZ: That is exactly right, your Honor.

21 MR. DAVIS: Shall I call the first witness,
22 your Honor?

23 THE COURT: Yes.

24 MR. DAVIS: The government calls Donald Klopfer.
25

md Klopfer - direct 7

D O N A L D A L F R E D K L O P F E R, called as a
witness, having been duly sworn, was examined and
testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Klopfer, I ask you to speak in a loud voice
because the acoustics are bad here.

Is it fair to say you are an investigator with
the New York City Police?

A Yes, I am.

Q Are you presently assigned to the New York
Drug Enforcement Task Force?

A Yes, I am.

Q How long have you been with the Task Force?

A Since 1970.

Q Would it be fair to say your duties in general
include investigation of drug violations?

A Yes. In the New York City area.

Q Mr. Klopfer, I would like you to turn your
attention to the date of October 30, 1975. Were you on duty
that day?

A Yes, I was.

Q Who if anyone was on duty with you?

A Special Agent John Mullen.

md

Klopfer - direct

8

1

2

Q Is he a Drug Enforcement Administration agent?

3

A Yes, he is.

4

Q Where were you?

5

A I was in Manhattan and then in Brooklyn.

6

Q When you were in Brooklyn, where did you go?

7

A At the Federal Courthouse, Southern District of New York. Correction -- the Eastern District of New York.

9

Q And what did you do when you were there?

10

A I debriefed a defendant in the presence of Special Agent John Mullen.

12

Q When you say a defendant, what do you mean?

13

A It was a defendant that was arrested the day before.

14

15

Q What had that defendant done that led to his being arrested?

16

17

A He was arrested in the possession of five ounces of brown rock heroin.

18

19

Q What did you do when you talked with him?

20

A He agreed to give me a written statement relative to his involvement in heroin traffic in the Brooklyn area.

21

22

Q Prior to doing that, did you discuss with him his constitutional rights?

23

24

A Yes, I did.

25

Q Did he acknowledge them?

1 md

Klopfer - direct

9

2 A Yes, he did.

3 Q What further did you talk to him about, and what
4 did he say?

5 A This defendant advised myself and Special Agent
6 Mullen that he had been involved in the trafficking of
7 heroin for approximately two months prior to his arrest,
8 and his source for the heroin that he had been selling,
9 which was approximately, he told me, twenty ounces in this
10 past two months, was the defendant here today. He just told
11 me his first name as Felix.

12 He said he did not know his lastname.

13 Q Did he describe this Felix to you?

14 A Yes, he did.

15 Q What physical description did he give?

16 A He told me that he was approximately five feet
17 eight inches tall, a Hispanic male, weighing 175 pounds,
18 and wears glasses, and has a mustache.

19 Q Did he say what kind of narcotics he had been
20 getting from Felix?

21 A Yes. Brown heroin.

22 Q What kind of narcotics had been found on this
23 defendant that we are talking about?

24 A Brown heroin.

25 Q What further did he tell you, if anything, about

1 md

Klopfer - direct

10

2 this person Felix?

3 A He advised me that Felix was on the work release
4 program connected with the New York State Correctional
5 Institute at 550 West 20th Street, New York City.

6 Q And what institution was that?

7 A That's Bayview Correctional Institute.

8 Q Did he say anything further?

9 A Yes. He told me that he believed that he would
10 live in Queens if he was not up in the Center; he would have
11 to go to the Center each night.

12 Q Is this Felix?

13 A Yes.

14 Q And did he say where this Felix worked?

15 A Yes. He told me that he worked in a grocery
16 store, a Spanish grocery store on South 5th Street at
17 Hooper. He told me on the right side when you come down
18 South 5th Street, which is a one-way southbound.

19 Q Is that in Brooklyn?

20 A Yes, it is.

21 Q Did this person that you were talking about
22 describe in any way the manner in which he had purchased
23 heroin from this person Felix?

24 A Yes, he did.

25 Q What did he tell you, to the best of your

1 md Klopfer - direct 11

2 recollection?

3 A He told me that Felix used his Buick -- he had
4 a Buick, he told me, he believed it was a late model, 1972
5 about, a large Buick, the Electra.

6 Q Did he say what state license plates he had?

7 A Yes. It had New York plates, but he couldn't
8 give me even one letter or one number. And -- I'm sorry,
9 can I have the question prior?

10 Q Did he describe to you how he purchased, or
11 how this person Felix distributed the heroin?

12 A Yes. He said that he -- excuse me, meaning
13 Felix -- would bring the heroin to the subject that we
14 arrested on the 29th of October in his Buick, and he would
15 utilize common brown paper bags. The heroin would be
16 placed in these bags, if it was a small quantity. If it
17 was a large quantity, it would be in a shopping bag. And
18 he did observe this defendant at one time with one hundred
19 ounces of singly wrapped ounce packages in a shopping
20 bag.

21 Q The person you were talking about, did he tell
22 you anything he knew about Felix's sources?

23 A Yes. He believed that Felix's source was two
24 Cuban males.

25 Q And why did he believe that?

1 md Klopfer - direct 1.
2 defendant that was arrested on the 29th, the same defendant
3 that I debriefed in the presence of Special Agent John
4 Mullin.

5 Q When did you write that report?

6 A It was prior to November 6, 1975.

7 Q On the Xerox copy that you have before you,
8 there are certain black marks indicating deletions. Can
9 you tell us what has been deleted?

10 A The defendant's name that I debriefed, and a
11 section in here that would indicate possibly who he or she
12 may be.

13 MR. DAVIS: I offer this in evidence.

14 THE COURT: You offer this for the hearing?

15 MR. DAVIS: Just for the hearing.

16 THE COURT: Any objection?

17 MR. PANZER: We haven't seen it.

18 THE COURT: Look at it, and let me know if there
19 is any objection.

20 Go ahead.

21 Q Now, Mr. Klopfer, following the debriefing that
22 you have described, what did you next do with respect to
23 this investigation?

24 A The following day I went personally to the
25 Bayview Correctional Institute, and I requested to look

1 md

Klopfer - direct

14

2 through their card catalog of any and all inmates that
3 were presently on the work release program.

4 Q What did you see?

5 A I found a card in there with the name of Felix
6 Ortiz on it.

7 Q Were there any other Felixes? Any other people
8 named Felix?

9 A To my recollection there was no other Felix.

10 Q What was the full name of the person you saw?
11 Was there any other name?

12 A Felix Diaz Ortiz.

13 Q Did you get any other information from that
14 card?

15 A Yes. There was an indication in there of a
16 Queens address, 3307 Junction Boulevard. That was the
17 address, I believe, of his wife in Jackson Heights.

18 Q What further did you do with that?

19 A I then copied some information from -- I as-ed
20 to see the jacket, his folder, personnel folder. I
21 reviewed that and I made some notations in respect to his
22 New York City B number.

23 Q Just very briefly what is a B number?

24 A I believe it is a sort of a control number of
25 all individuals arrested in New York City.

1 ind Klopfer - direct 15

2 Q What did you do next?

3 A With that number I then came to the New York
4 City BCI, and I pulled his jacket, and I --

5 THE COURT: What is the New York City BCI?

6 MR. DAVIS: Thank you, your Honor.

7 Q What is the BCI?

8 A I think they call it Bureau of Criminal
9 Investigation.

10 Q Is that in the Police Department next door to
11 here?

12 A Yes.

13 Q What did you find?

14 A I pulled his jacket, I made a copy of his
15 arrest report, and then I went over to photo, the photo
16 unit, the New York City Police Department photo unit, and
17 requested three photographs of Ortiz.

18 Q I am putting before you what has been marked
19 Government Exhibit 2 for identification in this proceeding.
20 Is that a copy of a photograph that you got on that date?

21 A Yes, it is.

22 MR. DAVIS: I will also offer that, your
23 Honor.

24 THE COURT: All right. Show it to counsel.

25 Q Did you do anything further with respect to

1 md Klopfer - direct 16

2 this investigation on the 31st of October?

3 A Yes, I did. I contacted New York State Motor
4 Vehicle Department.

5 Q What did you find?

6 A With the name Felix Ortiz and his date of birth
7 I ran it through their files.

8 Q What did you find?

9 A I came up with a license for a Felix Ortiz with
10 an address of 1102 Eastern Parkway in Brooklyn that had
11 been revoked. Then with the same date of birth, excluding
12 the yea. it was a different year, I came up with another
13 driver's license for the same address for the same subject,
14 and also a vehicle, being a Buick, the Electra, license
15 plate No. 83 DIC registered in the name of Felix Ortiz,
16 again with the address of 1102 Eastern Parkway, Brooklyn.

17 Q Do you remember what model year the car was?

18 A I don't recall. Late model. A newer
19 vehicle.

20 Mr. Klopfer, between that date of October 31,
21 1973, and November 17, 1973 -- between those two dates --
22 did you do anything with respect to this investigation?

23 THE COURT: Between what dates?

24 MR. DAVIS: October 31st which is when he
25 went to the Motor Vehicle Bureau, and the 17th, the day of

1 md

Kloplfer - direct

17

2 the arrest.

3 Q What if anything did you do with respect to
4 this investigation?

5 A On numerous occasions, I had passed through the
6 area of Hooper and South 5th Street, and also the Queens
7 location at 3307 Junction Boulevard, Jackson Heights.

8 THE COURT: No, wait a minute. Where did you
9 go on numerous occasions?

10 THE WITNESS: To the vicinity of South 5th
11 Street and Hooper in Brooklyn.

12 THE COURT: And that is in Brooklyn?

13 THE WITNESS: In Brooklyn, yes.

14 THE COURT: And the other was --

15 THE WITNESS: And 3307 Junction Boulevard,
16 Jackson Heights.

17 THE COURT: South 5th and Hooper was what?

18 THE WITNESS: Brooklyn.

19 THE COURT: Yes, but I mean how did you get
20 that?

21 THE WITNESS: That was the address from the
22 subject I debriefed where Felix was supposed to work in a
23 grocery store.

24 THE COURT: I see. I understand.

25 MR. DAVIS: May I proceed, your Honor?

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Klopfert - direct

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2 THE COURT: Yes.

3 Q When you went to those two places, can you tell
4 us what if anything you saw?

5 A On a couple of occasions I had observed the
6 Blue Electra with New York registration 83 DLC parked on
7 Northern Boulevard at the corner of Junction Boulevard.
8 This would be in the vicinity of 1107, which is a corner
9 building, and it was unoccupied.

10 THE COURT: Wait. In Queens or Brooklyn?

11 THE WITNESS: Jackson Heights, Queens.

12 Q What else did you see during this period?

13 A And then on, I believe it was November 6th --
14 it was at night, approximately nine o'clock -- I observed
15 the Buick parked on South 5th Street in the vicinity of
16 Hooper. And then I saw Mr. Ortiz enter the building on
17 the driver's side, there was no passenger, and myself and
18 police officer Burbage followed the Blue Buick and it turned
19 onto Broadway, and then down onto -- I don't recall the
20 street, but it parked in the vicinity of the Two Steps Bar
21 on South 5th Street. It is in the Williamsburgh Section
22 of Brooklyn near the Williamsburgh Bridge.

23 Q Then what happened?

24 A And I saw Mr. Ortiz exit the Buick from the
25 driver's side and walk up South 5th Street and enter the

1 md

Klopfer - direct

19

2 Two Steps Bar.

3 Q What was the closest that you got to that
4 person on that day?

5 A Maybe a half a block. Approximately a half a
6 block.

7 Q How clearly did you see him on that day?

8 A Half a short block.

9 Q How clearly did you see him on that occasion?

10 A I could see him relatively clearly.

11 Q What further happened? Tell us briefly what
12 further happened on that day.

13 A He remained in the bar approximately twenty
14 minutes, maybe a half hour at the most, and then he exited
15 the bar, he entered his Buick, and he drove across the
16 Williamsburgh Bridge, drove north and parked on 19th
17 Street, West 19th Street, in the vicinity of Bayview, and
18 we broke off surveillance as we observed Mr. Ortiz walking
19 toward the Bayview Correctional Institute, where he was
20 supposed to be in at ten o'clock each night.

21 Q Now, Mr. Klopfer, I would like to turn your
22 attention to November 17, 1975, and in the morning of that
23 day were you on duty?

24 A Yes, I was.

25 Q Where did you start out? What was the first

1 md Klopfer - direct

2 thing you did that morning?

3 A I drove through Queens, and at approximately
4 ten o'clock in the morning I observed again the Blue Buick
5 New York registration 83 DLC parked in the same location
6 where I had seen it on several occasions prior to that
7 date, and that would be facing eastbound on Northern
8 Boulevard on the south side at Junction Boulevard.

9 Q And what happened?

10 A I radioed to Special Agent John --

11 THE COURT: This is all very fine, but it is
12 immense detail.

13 MR. DAVIS: We are getting to the juicy part,
14 your Honor.

15 THE COURT: What is the issue here? The
16 government is following chapter and verse what it put in its
17 memorandum in great detail, but what is the issue? We want
18 to either get the evidence suppressed or get it to trial.
19 What is the contention?

20 MR. PANZER: May I ask we excuse the agent
21 while making arguments?

22 THE COURT: Yes, but I would like to shortcut
23 this. I have to go into Part 1 Monday, and if we are going
24 to have a trial I want the trial to start this afternoon,
25 get the jury picked and get going, so you step out a little

1 md Klopfer - direct 21

2 bit. Maybe we can shortcut this.

3 (Witness excused.)

4 THE COURT: If the government can prove what
5 it has put in its memorandum there is all kinds of
6 probable cause and that's all there is to it.

7 MR. LOPEZ: I don't see it quite that clearly,
8 your Honor. My situation is we have an informant here who
9 is the subject matter of arrest who has proven prior
10 reliability is in question because he was in fact under
11 arrest and trying to make a deal for himself. He was never
12 used before. His reliability was not tested

13 The agents make over a period of two weeks
14 certain observations. The most they ever see Ortiz is on
15 November 17th. when he is in the company of two Hispanic
16 males that go into his car carrying a brown paper bag.
17 On that basis they decide to arrest him. There was no
18 warrant, nothing.

19 THE COURT: On that state of facts I would
20 unhesitatingly tell you I would find probable cause. If
21 there is an issue of fact here, then let's explore it.
22 If it is simply an issue of the conclusion to be drawn from
23 those facts --

24 MR. LOPEZ: Yes, your Honor.

25 THE COURT: -- I must tell you I would disagree

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Klopfer - direct

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2 with you.

3 Is there a way we can -- you know, I may be
4 right, I may be wrong, but I take it from what you are
5 saying that there really isn't ultimately going to be a
6 lot of challenge to the facts. The real question is what
7 conclusion do you draw, and ask me to draw, from the
8 facts.

9 MR. LOPEZ: First of all, there is insufficient
10 probable cause here to make an arrest.

11 I say secondly that there was ample opportunity
12 if they did feel they had probable cause to get a
13 warrant, which they didn't get, either an arrest or a search
14 warrant, which obviously they did not get. And I can assure
15 your Honor that I will ask this agent, this officer, very
16 few questions, I will come right to the point, and I just
17 want to bring in and highlight certain aspects of the
18 thing.

19 THE COURT: You try to go as quickly as you can,
20 because I think we know what the issue is, and we just
21 ought to come to it quickly.

22 MR. DAVIS: Okay. I will do my best to skip
23 over irrelevant things. I do not want to risk leaving
24 out anything that might later be held necessary.

25 MR. PANZER: May I just be heard in adding to

1 md Klopfer - direct 23
2 to Mr. Lopez's argument?

3 THE COURT: Yes.

4 MR. PANZER: I think there is a very
5 significant question on why they didn't get a warrant,
6 because when you read the government's memorandum they
7 made almost the identical observations on November 13th,
8 and then on November 17th they make the arrest and
9 seizure. They had four days to get a warrant, and had
10 him under observation --

11 THE COURT: What you are really saying is you
12 are taking the government's version of the facts and
13 saying there should have been a warrant.

14 MR. PANZER: That is my position.

15 THE COURT: For the purposes of the hearing,
16 can't we assume the facts laid out in the government's
17 brief are correct and uncontested?

18 MR. PANZER: The problem is we weren't there,
19 we don't know what the agent is going to say. That's the
20 problem. This is just the government's representation of
21 what happened. We have no way of knowing whether that
22 did or did not happen.

23 THE COURT: Okay. Go ahead.

24 MR. DAVIS: I will do my best to truncate it,
25 your Honor.

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Klopfer - direct

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2 THE COURT: That's fair enough.

3 BY MR. DAVIS:

4 Q Mr. Klopfer, in the interest of speed, since time
5 is pressing, I will ask you to do your best to limit
6 details that may not be necessary to this hearing.

7 Perhaps I can lead him, your Honor.

8 On the morning of November 17th, would it be
9 fair to say when you first went out to this junction in
10 Queens that you described, saw the Buick, and then you left
11 because you had pressing business back in your office?

12 A Yes, that's correct.

13 Q And is it also fair to say that Mr. Mullin of
14 your office, with whom you were in radio contact, took up
15 surveillance?

16 A That's right.

17 Q What happened when you got back to your
18 office?

19 A When I reached my office I was advised by Police
20 Officer Burbage that he had just been in contact with
21 Special Agent Mullin, who had advised him that the vehicle
22 was moving.

23 Q Did he tell you, or tell in brief fashion what
24 route the vehicle took?

25 A Yes. He told me it took local streets and then

1 md Klopfer - direct

2 the Brooklyn-Queens Expressway, and crossed the Williamsburgh
3 Bridge into lower Manhattan.

4 Q Did there come a time you saw the vehicle?

5 A Yes.

6 Q Where?

7 A Driving west on West Houston Street.

8 Q Did you see who was in the car?

9 A Yes.

10 Q How close were you to the car on that occasion?

11 A Fifteen feet.

12 Q Is the person driving the car in the courtroom
13 today?

14 A Yes, he is.

15 Q Will you point him out to the Court?

16 A The male subject with the blue suit and glasses.

17 Q All the way over on your right?

18 A Yes.

19 MR. DAVIS: I would like the record to reflect
20 the identification of Mr. Ortiz, your Honor.

21 THE COURT: All right.

22 Q Tell us again in brief fashion what you did on
23 that occasion.

24 A I contacted Billie -- excuse me, Police Officer
25 Bill Burbage -- and then also joined by Special Agent

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Klopper - direct

2 Mullin we followed the Ortiz vehicle up to midtown.

3 Q Would it be fair to say the vehicle went up
4 Eighth Avenue and then crossed 59th Street?

5 A Yes.

6 Q And then down Seventh Avenue?

7 A Yes. And stoppped on the west side of 58th
8 Street on Seventh Avenue.

9 Q Where were you when the car came to a stop at that
10 point?

11 A I was at the corner of 59th and Seventh.

12 Q What did you do?

13 A I stopped -- I parked my car and I got out.

14 When I walked to the corner and looked around the corner I
15 saw Mr. -- I saw the Buick pulling out, and now it had two
16 males in it in the front seat.

17 Q Was there a period of time when you couldn't
18 see the car?

19 A Yes.

20 Q How long was that period of time?

21 A A few seconds.

22 Q Had you ever seen the person who was in the car
23 with Mr. Ortiz before?

24 A No.

25 Q Did you recognize him at that point?

md Klopfer - direct

27

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2 A No, I did not.

3 Q what happened?

4 A The vehicle continued down Seventh Avenue
5 southbound, and it made a left on 57th Street, eastbound on
6 57th Street, made another left, which is northbound, on
7 Sixth Avenue, and at one point I was directly behind the
8 vehicle and I could see the operator of the vehicle, Mr.
9 Ortiz, in apparent conversation with the passenger, front
10 seat passenger. They were looking at each other, and their
11 lips were moving.

12 Q Would it be fair to say, summarizing to get
13 through that, he went up Sixth Avenue, across 59th Street,
14 and down Seventh Avenue?

15 A Yes.

16 Q Were you following at this point?

17 A Yes, I was.

18 Q Were other agents in the neighborhood with whom
19 you were in radio contact?

20 A Yes, there were.

21 Q When the car got on Seventh Avenue again, what
22 happened?

23 A The vehicle pulled over onto the -- on the west
24 side of Seventh Avenue between 58th Street and 57th and
25 came to a stop.

md Klopfer - direct

Q And what happened when the car came to a stop; what did you do?

A The car came to a stop and I stopped right at 58th Street and Seventh Avenue, and I observed a male step from the curb and enter the passenger side of the blue Buick and open the right door with his right hand and in the left hand I observed a brown paper bag approximately 8 inches by 12 inches. It had some writing on it, but I couldn't see that close.

Q When this person got in the car were there two people still in the car?

A Yes, there were.

Q What did they do when the three of them were in the car?

A After this third male got into the car, the car pulled away from the stopped space immediately, drove south on Seventh, and made an immediate left onto Sixth Avenue -- correction, 56th Street -- and pulled over to the curb on the north side almost immediately, and the two males as front seat passengers exited the vehicle, leaving Mr. Ortiz behind the steering wheel.

Q Did you see them get out yourself?

A Yes, I did.

Q How close did you get to those two people on

1 md Klopfer - direct

29

2 that occasion?

3 A I was approximately thirty, maybe fifty, feet.

4 Q Do you see those two men in the courtroom
5 today?

6 A Yes.

7 Q Will you please point out the first person to
8 get in the car?

9 A I didn't see him get in the car.

10 Q The first person --

11 A The last person to get out of the car was the
12 male with the sweater on, Mr. Gonzalez.

13 Q The gentleman on the right?

14 A Yes, sir.

15 MR. DAVIS: Identifying the defendant Gonzalez,
16 for the record.

17 THE COURT: Yes.

18 Q And the other person who was the last person
19 to get in the car --

20 A Right, the man who had the package in his hand
21 is the gentleman with the brown suit.

22 MR. DAVIS: Identifying the defendant Perez,
23 for the record.

24 THE COURT: Yes.

25 Q Would it be fair to say that those two gentlemen

1 md Klopfer - direct 30
2 subsequently got in the taxicab and went some place, and
3 you didn't see them again for a while?

4 A Yes. I was on foot at this time.

5 Q Would it also be fair to say, summarizing in
6 order to save time, that you and others followed Mr. Ortiz
7 in his Buick?

8 A Yes. But I would like to add when they exited
9 the vehicle on the passenger side neither one of them carried
10 this brown paper bag that I had seen earlier.

11 Q You did follow Mr. Ortiz?

12 A Yes, we did.

13 Q Did there come a time when he was approaching
14 the Queens Midtown Tunnel?

15 A Yes, there was.

16 Q What did you do then?

17 A It was approximately 11:45 in the morning. We
18 on the radio decided that we should stop him now so we don't
19 lose the vehicle possibly in the Tunnel. I pulled
20 directly in front of the vehicle and as I walked up to the
21 driver's side of the door I observed a fellow officer,
22 Burbage, approach the passenger side. Burbage opened the
23 door and he removed a brown paper bag from the floor
24 directly under or by the driver's seat.

25 MR. DAVIS: Your Honor, I won't go through the

1 md Klopfer - direct 31
2 motions of identifying the narcotics. That's here if
3 somebody wants to see it, but I don't think that is in issue.

4 MR. PANZER: May I see it?

5 MR. DAVIS: I will go through the motions.

6 Q Agent Klopfer, I am putting in front of you
7 what has been marked Government Exhibit 3 for identification
8 in this suppression proceeding. Would it be fair to say
9 that this contains a part of the material that was found
10 in that bag, and also the brown paper bag that was seen
11 on that day?

12 A Yes, that's correct.

13 Q And taken from Mr. Ortiz's car?

14 A That's correct.

15 Q Do you know where it came from in the car?

16 A Yes. It came from the floor just in front of
17 the driver's seat, and I put my initials on it, the case
18 number, and the date.

19 MR. DAVIS: I will offer it in evidence for this
20 proceeding.

21 THE COURT: Let counsel look at it.

22 Incidentally, we had an offer of Exhibit 1,
23 and an offer of Exhibit 2. Any objections to those
24 exhibits?
25

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Klopfert - direct

2 MR. PANZER: I have no objection to the
3 picture, 2, but I am going to object to 1 as being self-
4 serving. It is basically what he testified to.

5 THE COURT: Overruled.

6 MR. LOPEZ: All the defendants make that
7 objection, your Honor.

XX

8 (Government Exhibit Nos. 1 and 2 were received
9 in evidence.)

10 THE COURT: Any objection to Exhibit 3?

11 MR. PANZER: We haven't seen it.

12 MR. DAVIS: Shall I continue?

13 THE COURT: Yes, please.

14 Q What was done after the package was seized?

15 A Then I opened the driver's side door, and I
16 asked Mr. Ortiz to step out, and at this time officer
17 Burbage opened the package and he saw what he believed to
18 be the brown rock heroin, and told me so, and I heard him
19 place him under arrest.

20 I then frisked Mr. Ortiz there on the street,
21 and in his left front pocket of his leather coat I found
22 another package of what I believed to be brown rock heroin
23 at the time.

24 Q What happened next?

25 A He was placed under arrest, handcuffed, and

1 md Klopfer - direct

2 taken to our office for processing.

3 Q Did you take him to the office?

4 A No, I did not.

5 Q Would it be fair to say you got into his car
6 and drove it to the parking lot near his office?

7 A Yes.

8 Q And did there come a time when you got back
9 to your office?

10 A Yes, there was.

11 Q And how long a period of time was there between
12 the arrest at the Tunnel, and when you got back to your
13 office?

14 A Forty-five minutes.

15 Q What happened when you got back?

16 A Well, then I went and processed the -- gave a
17 har' to Burbage processing the evidence, and then I went
18 in and spoke to Mr. Ortiz.

19 Q Where were you at that point?

20 A In one of the debriefing rooms in our office,
21 201 Varick Street, in lower Manhattan.

22 Q What did you do when you began talking with
23 him?

24 A I first read Mr. Ortiz his oral warnings.

25 Q How did you do that?

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Klopfer - ct

34

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2 A By removing the oral warnings card I carry in
3 my pocket in my wallet.

4 Q Do you have it in your pocket this morning?

5 A Yes.

6 Q Would it be fair to say Government Exhibit 4
7 for identification is a Xerox copy of that card?

8 A Yes, it is.

9 Q Can you tell us exactly, precisely, how it was
10 you warned Mr. Ortiz of his rights?

11 A I removed the card, asked him if he spoke
12 English. He said, "Yes." I said, "I am going to read you
13 your rights, and at each pause in the sentence I would
14 like for you to answer out loud 'yes' if you understand."

15 I did this, and he said "yes" after each question
16 or statement.

17 Q And at any point did he ask you, or did he
18 tell you, that he did not speak English?

19 A No, he did not.

20 Q Did you ask him if he did speak English?

21 A Yes, I did.

22 Q What did he say?

23 A He said he did.

24 Q Is there any part of the words on Government
25 Exhibit 4 that you did not read to him?

1 md Klopfer - direct 35

2 A I read him the entire card.

3 Q Word for word?

4 A Yes, I did.

5 MR. DAVIS: I offer Government Exhibit 4 in
6 evidence.

7 Q What happened next, Mr. Klopfer?

8 A I then asked Mr. Orti if he cared to make
9 any statements. Then he asked me what would be the benefit
10 for him if he did, and I told him that he realized how heavy
11 the possible violation was with the weight that we removed
12 from his vehicle, and also I told him that I understood
13 that he was facing some additional state time, and he
14 acknowledged that.

15 Q And what happened next?

16 A And he gave me a story about a male he was
17 supposed to meet at twelve o'clock who was supposed to pick
18 the heroin up, that he was only transporting it for somebody
19 to give to somebody else, and when I told him I didn't go
20 for that story, then he told me what he believed, I guess,
21 to be the truth.

22 Q And what did he tell you?

23 A He told me that he received a call approximately
24 nine o'clock in the morning from a subject that he knew only
25 as Rigo, and that they were to meet later on in the morning

md

Klopfer - direct

36

1 in midtown Manhattan and they would give him a package of
2 heroin, and he would return later that night and meet them
3 in another location and give them \$45,000 in cash.
4

5 Q Without going into details at this point, Mr.
6 Klopfer, would it be fair to say that he described to you
7 the details of what you had seen in the area of 56th and
8 Seventh Avenue?

9 A Yes.

10 Q Did he tell you that?

11 A Yes, he did.

12 Q What precisely did he tell you would occur that
13 night?

14 A He told me he was supposed to meet this male
15 by the name of Rigo and the other fellow he did not know
16 his name in the vicinity of St. Nicholas Avenue at the
17 corner of 181st Street or 182nd Street, he didn't know what
18 corner until he could physically see it, and transfer the
19 money, \$45,000, to them at this particular time.

20 Q Again just to summarize, Mr. Klopfer, would it
21 be fair to say that he also told you that he had to be back
22 at a certain time and that if he wasn't there on time they
23 would telephone him on the corner?

24 A Yes, he told me they were aware that he was on
25 that work release program.

1 md

Klopper - direct

37

2 Q And did he -- well, did you ask him anything
3 about the car?

4 A Yes. I asked him if we could use his vehicle,
5 and he said yes, and he gave me a written authorization to
6 use the vehicle.

Q I put in front of you what has been marked
8 Government Exhibit 5 for identification. Would it be fair
9 to say that that is the written authorization you received?

10 A The original.

11 MR. DAVIS: I offer this in evidence, your
12 Honor.

13 Q Did you also ask him about a safe deposit box?

14 A Yes, I did.

15 Q Tell us in summary what he said would be in that
16 box, and what you did.

17 A He had a key on his person for a safe deposit
18 box, and I asked him if it was for a safe deposit box, and
19 he said yes, in Queens. And I asked him what was in it,
20 and he told me approximately \$7000. And I asked him how long
21 it took him to gather that kind of money selling drugs, and
22 he said a short period of time. And then I asked him if he
23 would give myself and Police officer Burbage written
24 permission to examine the box, and he said yes, he would.

25 Q Did there come a time somewhat later on in the

1 md Klopfer - direct
2 day when you received written permission?

3 A Yes.

4 Q I am putting in front of you, Mr. Klopfer,
5 what has been marked Government Exhibit 6 for identi-
6 fication in this proceeding, and is that the written
7 permission you received?

8 A Yes, sir.

9 Q And is your signature on it?

10 A Yes, it is.

11 MR. DAVIS: I offer this in evidence.

12 THE COURT: What is the number?

13 MR. DAVIS: Government Exhibit 6 for identi-
14 fication.

15 Do you want me to stop for objections on this?

16 THE COURT: No.

17 THE CLERK: I don't know what exhibits have been
18 received, Judge.

19 THE COURT: We will get to it later.

20 Q Would it be fair to say in this proceeding at
21 this point you have not gone into every detail of what you
22 saw that day or every detail of what Mr. Ortiz told you?

23 A That's correct.

24 Q Did there come a time that afternoon -- and I am
25 talking about the 17th of November -- when Mr. Ortiz was

1 md Klopfer - direct 39
2 brought down to the United States Attorney's office, and the
3 United States Courthouse, for arraignment?
4 A Yes.
5 Q Roughly what time was it that he was actually
6 arraigned?
7 A Approximately five o'clock.
8 Q In the afternoon?
9 A Yes, sir.
10 Q What did you do thereafter?
11 A I returned to my office at Varick Street, and
12 I met with my boss and the assistant boss, and the other
13 members of our group, to formulate plans on what we would
14 do for possible apprehension of the two other subjects at
15 approximately nine o'clock that night.
16 Q Did there come a time you went up to the area of
17 181st or 182nd Street and St. Nicholas Avenue?
18 A Yes.
19 Q Would it be fair to say before going there you
20 had a conversation with another detective?
21 A Yes.
22 Q Mr. Rodriguez?
23 A Yes.
24 Q Did you tell him in substance what had occurred?
25 A Yes. Mr. Rodriguez was going to be the undercover

md Klopfer - direct

officer that particular night, and he was going to empty Mr. Ortiz's vehicle in the event we needed it, and he would attempt to meet with the two males if I observed them up in that area.

Q What happened when you got to that area?

A I arrived there approximately 8:15. About a half hour later I observed the two defendants here to my left --

Q You mean Mr. Perez and Mr. Gonzalez?

A Yes. -- standing on the corner of 182nd Street and St. Nicholas Avenue.

Q Where were you?

A I was a half a block away in a surveillance vehicle, a mail truck, and I was using binoculars, 7 x 35 binoculars.

Q What did you see them do?

A I saw Mr. Gonzalez enter the phone booth and come out, and then I called Sgt. Garrity on the radio and I requested that he send undercover officer Rodriguez in, drive up, keep a distance from the two males on the corner, and drop the lower window using the electric window opener, and just call out "Rigo," to see if anybody would approach the vehicle.

Q Would it be fair to say that moments later Mr.

1 md

Klopfer - direct

2 Rodriguez did drive up in Mr. Ortiz's Buick?

3 A Yes, sir.

4 Q What did you see when that happened?

5 A I saw Mr. Gonzalez step from the curb and walk
6 over to the car and seemingly engage Mr. -- excuse me,
7 Detective Rodriguez in conversation. At this time I put
8 over the radio that the surveillance units were to move in
9 and make the arrest.

10 Q Did you participate in the arrest?

11 A Yes. I left the truck. I placed them both
12 under arrest myself.

13 Q When you arrested Mr. Perez and Mr. Gonzalez,
14 would it be fair to say that they were wearing the same
15 clothes they had worn earlier on that day?

16 A Yes, they were.

17 Q Did you positively identify them as the same
18 people?

19 A Yes, I did.

20 Q Again to summarize, would it be fair to say the
21 two of them were taken off in a car, and that you stayed in
22 the area for a while?

23 A Yes.

24 Q And when did you get back to the headquarters?

25 A It was about two hours later.

md Klopfer - direct

42

Q And what happened when you got back?

A I went in and I spoke with Mr. Gonzalez.

Mr. Perez, I was informed, did not speak any English.

Mr. Gonzalez did, and I spoke with Mr. Gonzalez.

Q Did you yourself advise him of his constitutional rights?

A No, but I had Detective Rodriguez -- he told me that they were already advised, but I said "Do it again," and I gave Detective Rodriguez the oral warning card in Spanish, and he read it to Mr. Gonzalez in my presence.

Q And do you carry a copy of the oral warning card in Spanish yourself?

A Yes, I do.

Q And you gave it to Detective Rodriguez?

A Yes.

THE COURT: What is the issue? They are not seeking to suppress statements, are they?

MR. DAVIS: There is a statement as to Mr. Gonzalez. There is a statement as to Mr. Perez, but we are not going to use it, so there is no issue. It is only the statement as to Mr. Gonzalez.

THE COURT: All right.

Q I put before you, Mr. Klopfer, Government Exhibit 7 for identification, in this proceeding.

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Klopfer - direct

42

1
2 Is that a xerographic copy of your advice of
3 rights form in Spanish?

4 A Yes, it is.

5 Q Is this what you gave Mr. Rodriguez?

6 A Yes, it is.

7 MR. DAVIS: I will offer this in evidence as
8 well, your Honor.

9 Q Now, you tell us what conversation, if any,
10 you had with Mr. Gonzalez on that evening.

11 A Mr. Gonzalez told me that if he and his brother
12 were set free he could go to California and in a matter of
13 a few days make connections to purchase heroin and then an
14 undercover officer from our office or wherever could come out
15 there to buy whatever quantity we sought.

16 Q And what did you say?

17 A I told him that couldn't be.

18 Q And did you have any further conversation with
19 Mr. Gonzalez at that point?

20 A No, I think we broke off. I had conversation
21 off and on throughout the debriefing period.

22 Q At any time in your conversation with Mr.
23 Gonzalez did you mention, did you discuss, his having a
24 lawyer?

25 A Yes.

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Klopfer - direct

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Q And what was that conversation?

3

4

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6

A He was in a room which has a telephone, and I said if he wanted to call a lawyer, because he had in his possession a business card with the name of Alvin S., I believe, Michaelson.

7

8

9

Q I am putting in front of you Government's Exhibit 8 for identification. Is this the business card that you are talking about?

10

11

12

A Yes.

MR. DAVIS: I offer this in evidence as well, you

Honor.

13

14

15

Q And what did he say when you said that to him?

A He said he did not want to call a lawyer at this time.

16

17

Q At any time during the evening of November 17th, did you physically touch Mr. Gonzalez?

18

A No, I did not.

19

20

Q And at any time during that evening, did you speak in a loud voice or an abusive voice?

21

A No, I did not.

22

23

Q Did you make any statements to him other than the ones that you have mentioned to us here today?

24

25

A Other than his cooperation may benefit him, any cooperation he gave us, I would make it known to the

prosecuting U. S. Attorney and the sentencing judge in the form of a letter.

A No, I did not.

A Other than to search him, no.

A No.

A No, other than I -- no, I believe I did testify
I could possibly with a letter assist him.

A Yes.

A It was about 1:30 a.m.

A Yes, I did.

md

Klopfer - direct

45

1
2 Q Would it be fair to say that during the morning
3 you took him to the office of Assistant U. S. Attorney
4 Eugene Bannigan?

5 A That's correct.

6 Q What happened there?

7 A On the way up there I said to Mr. Gonzalez,
8 "Don't say anything now" -- we were down in the jail.
9 I said, "If you are going to cooperate at all wait until
10 we get upstairs." And I said, "Remember, it has to be 100
11 per cent our way." Because the night before he wanted to
12 more or less run whatever cooperation he wanted to do his
13 way. So he said, "No, I thought it over and I will
14 help" -- he said, "help my brother," I believe he said.

15 So we went up to Mr. Bannigan's office.

16 Q And then what happened?

17 A And then in Mr. Bannigan's office Mr. Gonzalez
18 again said that he could go to California, but he wanted
19 his brother to be set free and be in Florida. When he
20 received notification that his brother was safe in Florida,
21 he would then go to California, remain there approximately
22 two days, and whatever amount of heroin we wanted, hundreds
23 of pounds, etc., he believed he could make the proper
24 connection.

25 Q Were you in Mr. Bannigan's office at all times?

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Klopfer - direct

46

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A No.

3

Q Were you in and out?

4

A Yes.

5

Q Was Mr. Bannigan in the office at all times?

6

A No, he was not.

7

Q Do you yourself recollect Mr. Bannigan

8

informing Mr. Gonzalez of his constitutional rights?

9

A No, I don't.

10

MR. DAVIS: I have no further questions of

11

this witness, your Honor.

12

THE COURT: All right. Cross examine.

13

MR. DAVIS: There is a pending offer of certain

14

exhibits, your Honor.

15

THE COURT: What about those?

16

THE WITNESS: Can I add something, your Honor?

17

THE COURT: Sure.

18

THE WITNESS: On the back of the business card

19

for Michael -- excuse me, Alvin S. Michaelson, is the

20

non-published telephone number of the defendant Felix

21

Ortiz.

22

THE COURT: All right.

23

What about Exhibit 3? Any objection?

24

(No response.)

25

THE COURT: Hearing none, Exhibit 3 is received

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Klopfer

47

1 in evidence.

2 Exhibit 4?

3 MR. MICHAELSON: No objection for purposes of
4 this hearing.

5 THE COURT: I understand. We are talking about
6 just this hearing.

7 That will be received in evidence.

8 Is there an Exhibit 5?

9 MR. DAVIS: That was the consent to use the
10 car signed by Mr. Ortiz.

11 MR. LOPEZ: No objection for the purposes of
12 this hearing, your Honor.

13 THE COURT: What is 6?

14 MR. DAVIS: That is the consent to get into the
15 safe deposit box.

16 MR. LOPEZ: Again no objection, your Honor.

17 MR. DAVIS: And 7 is the rights card in
18 Spanish.

19 THE COURT: Any objection?

20 (No response.)

21 THE COURT: All right, they will be received
22 for this hearing.

23 (Government Exhibit Nos. 3 - 7, inclusive,
24 were received in evidence.)
25

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1 md

Klopfer - cross

2 THE COURT: And 8, the lawyer's card, we will
3 receive that for this hearing, also.

4 (Government Exhibit No. 8 was received in
5 evidence.)

6 THE COURT: You may cross examine.

7 CROSS EXAMINATION

8 BY MR. LOPEZ:

9 Q Officer, have you used any documents or Govern-
10 ment exhibits to refresh your recollection in preparation
11 for your testimony here today?

12 A Yes, I have.

13 Q What exhibits were those?

14 A They were for one the debriefing, and others
15 would be out of the case report.

16 MR. LOPEZ: Your Honor, may I see those?

17 THE COURT: Certainly.

18 MR. DAVIS: I do object. One of them has
19 already been turned over, and that is the debriefing with
20 certain names excised. The rest of the stuff is 3500
21 material that I will turn over if I understand that we are
22 going to trial today. If the trial is being put over, I
23 would rather wait until we go to trial.

24 THE COURT: We are going to trial the minute
25 this is over, and I hope we will move.

XXX

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Klopfer - cross

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2 MR. DAVIS: Then I will turn over all 3500
3 material.

4 THE COURT: That's the best way.

5 (Documents handed to counsel.)

6 MR. LOPEZ: Your Honor, may we have several
7 minutes to look at this?

8 THE COURT: Yes.

9 (Pause.)

10 THE COURT: Can we go ahead?

11 MR. LOPEZ: Yes.

12 Q Officer, on October 30, 1975, in the Eastern
13 District of New York courthouse, you interviewed an
14 informer, isn't that correct?

15 A (No response.)

16 Q You interviewed an informer -- a person who
17 turned out to be an informer; is that correct?

18 A Correct.

19 Q This is the first time you had ever met him;
20 is that right?

21 A No.

22 Q You had met him before?

23 A I was present on his arrest.

24 Q Had he ever previously until October 30th, 1975,
25 ever given you any information?

1 md

Klopfer -cross

2 A No.

3 Q Was he a registered informant, to your knowledge?

4 A No, he was not.

5 Q He had not given you previous to October 30,
6 1975, any arrests of other individuals, is that correct?

7 A Correct.

8 Q And at that point and at that juncture he was
9 an unknown quantity as far as his reliability was concerned,
10 is that also correct?

11 A Absolutely.

12 Q He was under arrest, isn't that right?

13 A Correct.

14 Q He had made direct sales to undercover
15 officers?

16 THE COURT: We all know this, and they didn't
17 immediately go out and arrest anybody on the strength of
18 his representation, hey checked it out.

19 I will assume everything you are going to argue
20 about the unknown quantity as of October 30th.

21 MR. LOPEZ: Okay.

22 THE COURT: He has admitted it.

23 Q On October 30th, 1975, this informant provided
24 you with no information with regard to the future activities
25 of the defendant Ortiz, isn't that correct?

md Klopfer - cross

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A That's true.

Q He gave you general information with respect to Ortiz, isn't that right?

A (No response.)

Q Just general information.

A I didn't consider it general. He gave specific --

Q Okay, he indicated to you on October 30, 1975, that Ortiz's source of supply were two Cubans who came from the lower portion of Manhattan; is that correct?

A He believed.

Q He believed, is that right?

A That's what he told me.

Q Did you verify that information?

A No, we didn't.

Q You had Ortiz under surveillance for the time interval between October 30th and November 17, 1975; is that right?

A Myself one night.

Q And at no time did you see Ortiz receive any brown paper bags from anyone in the lower part of Manhattan; isn't that correct?

A Myself, no.

Q The only time that you claim, as far as you are concerned, is the November 17th period when two Cubans

md

Klopfer - cross

52

1 entered his car -- when two Hispanics entered his car,
2 one carrying a brown paper bag; isn't that correct?
3

4 A Yes.

5 Q November 17, 1975, was a Monday; is that
6 right?

7 A It could have been.

8 Q And this was one of the largest shopping areas
9 in New York City in this vicinity?

10 A I never shop there.

11 Q But there were many people in it?

12 A Not that many, surprisingly.

13 Q Was there traffic on the street?

14 A Yes.

15 Q Were there people walking on the street in
16 midday Monday in Manhattan?

17 A Yes.

18 Q Many people were carrying packages, if you
19 recall?

20 A I don't recall.

21 Q On November 17, 1975, who gave the order to
22 effect the stopping of the Ortiz vehicle?

23 A In all probability myself.

24 Q And that was on the basis of the information
25 that you had received on October 30th from the informant,

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Klopfert - cross

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1
2 isn't that correct?

3 A And another prior surveillance.

4 Q And a prior surveillance on what date?

5 A I believe November -- I was not present --
6 November 13th.

7 Q Information that had been given to you as far
8 as something that had happened on November 13, 1975 in
9 Brooklyn, is that correct?

10 A Yes.

11 Q And you were told at that time certain informa-
12 tion but you had not seen it yourself, is that correct?

13 A That's correct.

14 Q Now, on November 17th, these two unknown --
15 these two individuals that entered the Ortiz car, did you
16 know them?

17 A No, I did not.

18 Q You had not been able to associate either of those
19 individuals with the narcotics traffic, is that correct?

20 A That's correct.

21 Q On November 17th, when you saw one of the males
22 that entered the Ortiz car -- you saw him carrying a package,
23 is that correct?

24 A Yes, I did.

25 Q And at that time, of course, naturally from what

1 ,d Klopfer - cross

2 you have told us you did not know of your own knowledge
3 what was in that package?

4 A Correct.

5 Q And when you saw the two individuals leave the
6 Ortiz car, I think it is your testimony that you did not
7 see either of them carrying the package?

8 A Correct.

9 Q You did not know if the package had been secreted
10 on their person or anything of the sort?

11 A No.

12 Q In other words, you assumed that the package
13 had been left in the car, isn't that correct?

14 A Yes, because of the size, and I didn't believe
15 they had it on their clothing.

16 Q So you made an assumption it had been left with
17 Ortiz, is that correct?

18 A Yes.

19 Q And your information was that Ortiz was carrying
20 on his transactions in the lower part of Manhattan, isn't
21 that right?

22 A Yes.

23 Q And this was in midtown Manhattan, isn't that
24 correct?

25 A Correct.

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Klopfer - cross

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Q From the period of October 30, 1975, to November 17, 1975, did you ever attempt to get an arrest warrant or a search warrant for Ortiz?

A No, I did not.

MR. LOPEZ: I have no further questions of this officer.

THE COURT: Anything else?

MR. MICHAELSON: Yes, I do, your Honor.

BY MR. MICHAELSON:

Q If you don't hear me, Officer Klopfer, will you tell me, because it is hard for me to hear you, also.

Officer, you made a statement, you made an affidavit, on November 18, 1975, is that correct?

A An affidavit for what?

Q An affidavit in support of the complaint in this case.

A Yes.

Q I don't want to waste the Court's time and your time. In that affidavit you referred to a statement by a Mr. Victoriano Perez. You referred to a statement made by him?

A I don't recall. May I see it?

MR. MICHAELSON: May I approach the witness?

THE COURT: Yes, of course.

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Klopfer - cross

56

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2 Q Will you read the affidavit briefly. You have
3 had a chance to look at your affidavit of November 18,
4 1875; is that correct?

5 A Yes.

6 Q And that was made in support of the complaint,
7 is that correct?

8 A Yes.

9 Q And this was subsequent to your arrest of Mr.
10 Ortiz on November 17, 1975, is that correct?

11 A Yes.

12 Q And you indicate in your affidavit that the
13 statement was made by Victoriano Perez; is that right?

14 A Yes.

15 Q There is nothing in here about a statement being
16 made by Mr. Gonzalez on November 17th, is there?

17 A Not that I recall.

18 Q Well, you have had a chance to look at it?

19 A Yes.

20 Q There is nothing?

21 A No.

22 Q We have just been given certain material by the
23 office of the United States Attorney which purports to be
24 material that you reviewed before testifying here today;
25 is that correct -- certain statements, certain reports?

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Klopfer - cross

57

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A I didn't see it all.

3

Q Those reports were made approximately November

4

25, 1975, is that not correct?

5

A I don't know.

6

Q I direct your attention to your report of

7

November 20, 1975. You have had a chance to review it now,

8

have you not?

9

A Briefly, yes.

10

Q Do you need more time to review it?

11

A If you are going to ask me very minute

12

specific --

13

Q I am going to ask you a very minute question

14

in that report. If you have any question I will be happy

15

to come up and show it to you again.

16

In your particular report of November 20, 1975,

17

you again refer to a statement being made by Mr. Perez;

18

is that not correct? Or do you?

19

A I don't recall.

20

Q Is it true that you refer to a conversation at

21

approximately 8:50 p.m. on November 17, 1975? Do you recall

22

that?

23

A At 8:50, at the time of the arrest?

24

Q Yes. Just subsequent to the arrest.

25

A Yes.

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Klopfer - cross

58

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2 Q And you refer to the fact that you gave certain
3 rights to both Mr. Gonzalez and Mr. Perez, is that
4 correct?

5 A Yes.

6 Q Isn't it true in that particular paragraph you
7 indicate that both Mr. Gonzalez and Mr. Perez indicated to
8 you they did not understand English?

9 A If that's what it says.

10 Q It does say that. If you would like to see
11 it --

12 THE COURT What is the point? We are back and
13 forth. What is the point you are trying to make?

14 MR. MICHAELSON: The point I am trying to make,
15 very specifically, is there is no mention of any statement
16 being made by my client, No. 1 --

17 THE COURT: Okay, I will take that. You have
18 read it. Anything else?

19 MR. MICHAELSON: Yes, there is, sir.

20 THE COURT: What?

21 Q Mr. Klopfer, what does the term "mule" mean to
22 you, in narcotics parlance?

23 A One who does not profit directly in large sums
24 for carrying a quantity of a concealed item.

25 Q That could be a man or a woman, and not

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Klopper - cross

59

1 necessarily a woman?

2
3 THE COURT: What's this got to do with the
4 suppression hearing?

5 MR. MICHAELSON: I will go on to something
6 else.

7 Q Directing your attention to the arrest of
8 Mr. Rigoberto Gonzalez, did you overhear what was said
9 between Rodriguez and Rigoberto?

10 A Not in Spanish. I don't understand a word.

11 Q Did you hear something was being said while you
12 were conducting your surveillance at 182nd Street?

13 A No. I couldn't hear.

14 Q Directing your attention to November 17, 1975,
15 again, you indicated you saw my card in Mr. Gonzalez's
16 possession, is that correct? You took it from Mr.
17 Gonzalez?

18 A No, I did not. One of the fellow officers showed
19 it to me.

20 Q Do you know where that came from?

21 A His wallet, I was told.

22 Q And that was subsequent to his arrest; is that
23 correct?

24 A Yes, it was.

25 Q It is your testimony that Mr. Gonzalez did not

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Klopfert - cross

60

ask to speak with me?

A That's correct.

Q Did you ask him specifically whether he wanted to speak with me?

A That's correct. Both the night before and in Mr. Bannigan's office.

Q We are now talking about November 17th, the night before.

A Yes, sir.

Q And is it your testimony that you offered Mr. Gonzalez an opportunity to call me and that he did not do so?

A That's correct.

Q Incidentally, there is nothing in your report which so indicates, is there?

THE COURT: I will take your word for it. If you have reviewed it and if there isn't there isn't.

MR. DAVIS: I will be glad to offer the report in evidence.

THE COURT: We don't need the report in evidence. Subject to correction, I will take any representation you make about those reports, Mr. Michaelson.

MR. MICHAELSON: Thank you very much.

Q Directing your attention to the next day, do you

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Klopper - cross

61

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2 remember -- inidentally, what time did you have this
3 alleged conversation with Mr. Gonzalez on the 17th?
4 What time did that end?

5 A What time did it end?

6 Q Yes.

7 A Until he was placed in the custody of the U. S.
8 Marshals, which was up to -- they were examined by a
9 doctor, I think, close to three o'clock in the morning.

10 Q Did you come and pick him up the next morning?

11 A Yes, I did.

12 Q Incidentally, did you speak to Mr. Gonzalez that
13 night in English or Spanish?

14 A I don't speak Spanish.

15 Q So you spoke to him in English?

16 A Yes.

17 Q When you spoke to him, did he appear to have
18 any difficulty understanding?

19 A None at all.

20 Q Did he speak with an accent?

21 A Yes.

22 Q Was it a rather strong accent?

23 A On some words.

24 Q Did you have difficulty understanding him?

25 A No, I did not.

md Klopfer - cross

1
2 Q Did he indicate to you that he ever had
3 possession of this particular package that you were
4 referring to?

5 A No, he did not.

6 Q He said he wanted to help his brother, is that
7 right?

8 A Yes.

9 Q Did he specifically tell you that he knew some
10 people who he was going to introduce you to in California?

11 A He said he could find some people.

12 Q He could find some people?

13 A Yes.

14 Q Was that the word he used?

15 A Something similar.

16 Q Did you make any notation with respect to that
17 statement?

18 A No.

19 Q You made no note of that whatsoever?

20 A No, I did not.

21 Q Was there anyone present in the room when that
22 statement was allegedly being taken?

23 A It wasn't a -- it was just a few sentences here
24 and there.

25 Q Was there anyone present in the room when these

md Klopfer - cross

Q And did you tell the magistrate that Mr. Gonzales --

A Excuse me, I took him directly to the Assistant U. S. Attorney Eugene Bannigan's office. I'm sorry.

Q You didn't take him to the Magistrate's office?

A Not at that time.

Q Is there any reason you didn't take him to the Magistrate's office? It was open, wasn't it?

A Because the normal course of events is that they be spoken to and the necessary papers be drawn up by the Assistant U. S. Attorneys.

Q That is the normal course of your organization? That's the way you do it?

A For six years, yes.

Q But the Magistrate's office was open?

A I don't know.

THE COURT: We have had that before, and I assume it is open.

MR. MICHAELSON: Your Honor will take notice of it?

THE COURT: Sure.

Q When did you take him to Mr. Bannigan's office?

A Directly.

1 md

Klopfer - cross

65

2 Q At eleven o'clock?

3 A Yes.

4 Q Did Mr. Bannigan speak to Mr. Gonzalez at that
5 particular time?

6 A Yes, he did.

7 Q Was it at that particular time when you say
8 that these so-called statements regarding introducing to
9 other people were discussed?10 A Yes, but if I may you kept saying that
11 particular time. Everything cannot happen all at once.

12 Q What happened at eleven o'clock?

13 A We picked him up approximately eleven o'clock,
14 these two gentlemen, myself and Detective Rodriguez.
15 We walked from downstairs, from MCC --16 THE COURT: We don't need this detail. It is
17 just a repetition of the direct. Do you have anything
18 that contradicts or supplements the direct?19 MR. MICHAELSON: Your Honor, I am going to try
20 to skip a few points.

21 THE COURT: All right. Please.

22 Q What time did you arrive at Mr. Bannigan's
23 office? Perhaps that would be the best way to start.

24 A Perhaps twelve o'clock, eleven-thirty.

25 Q Did my client speak with Mr. Bannigan at twelve

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Klopfer - cross

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o'clock?

A I don't know if it was exactly twelve o'clock.

Q Were you there when he spoke to him?

A I was there in and out when both gentlemen were speaking with Mr. Bannigan through Angel Rodriguez or in English with Mr. Gonzalez.

Q When these particular statements were made about the socalled introduction to some poeple in California, were you present at that time?

A Absolutely.

Q And that was in English or in Spanish?

A In English.

Q Bannigan was there and Rodriguez was there?

A I don't recall now. Rodriguez was there, as I testified earlier. Mr. Bannigan is a very busy man. He was in and out of his office.

Q His own office?

A His own office.

THE COURT: We are not going to start any trial today. Let the jury go. Let's get going. This was supposed to be a reasonably short hearing. There really is no factual issue here, as counsel frankly conceded, and we have endless time spent on a lot of minutiae.

MR. MICHAELSON: I am trying to do the best I

1 md

Klopfer - cross

2 can.

3 THE COURT: You are not.

4 MR. MICHAELSON: I am trying the best I can.

5 I indicated there was no problem of fact with relation to
6 the arrest.

7 THE COURT: You are not adding one whit of
8 anything.

9 MR. MICHAELSON: Will your Honor admit the
10 voluntariness of giving up certain rights is an important
11 factor?

12 THE COURT: You are not adding anything on
13 that subject.

14 MR. MICHAELSON: I am trying.

15 THE COURT: Well, you are not.

16 MR. MICHAELSON; If your HONOR will give me
17 just a few moments I would appreciate it.

18 THE COURT: Okay.

19 Q Was Mr. Bannigan present, to your recollection,
20 when the statements were allegedly made by Mr. Gonzalez
21 relating to his introduction of certain people who were
22 dealing with him?

23 A I don't recall.

24 Q Do you recall that a sheet of paper was given
25 to Mr. Gonzalez for him to fill out with respect to his

md

Klopfer - cross

68

rights being given to him, and so forth?

A I don't recall.

Q Are you familiar with the statement of defendant before arraignment made to Assistant United States Attorney form?

A I don't recall. I testified earlier I was in and out of the office myself making phone calls, and so forth.

Q But you just happened to be there when this statement was made about the dealings?

A I asked him directly myself.

Q And this was in English?

A Yes, it was.

Q And what was it precisely he said to you in the United States Attorney's office?

A Precisely, exactly, I cannot give it to you.

Q Exactly what was said?

A I cannot give it to you exactly.

Q But that also was not made part of the statement prior to arraignment, is that correct?

A That's correct.

Q And that was also not testified to before the grand jury, is that not correct?

A That's correct.

MR. MICHAELSON: May I have one moment, your

1 md

Klopfer - cross

69

2 Honor?

3 (Pause.)

4 Q Mr, Klopfer, did you see my client, Mr. Gonzalez,
5 carry anything into a vehicle on November 17, 1975?

6 A No, I did not.

7 Q You didn't see him carry anything out of the
8 vehicle?

9 A No, I did not.

10 Q What time did you take Mr. Gonzalez down to the
11 arraignment, if you recall?

12 A That I don't recall.

13 Q Did you take him yourself?

14 A Yes, myself and I believe -- yes, Detective
15 Rodriguez.

16 Q You did make certain tape recordings of certain
17 conversations, did you not?

18 A I did not.

19 Q Were there tape recordings, to your knowledge,
20 made of certain conversations?

21 A Yes, there were.

22 Q But not with my client?

23 A That's correct.

24 Q With other particular people but not with my
25 client?

mcd

Klopfer - cross

70

A That's correct.

Q Directing your attention again to your statement on direct examination regarding Mr. Ortiz, you heard from the informant that the deals took place in downtown Manhattan, is that correct, lower Manhattan?

A No. He believed the connections were from
lower Manhattan.

Q And did he also indicate to you that he thought the people came from lower Manhattan to California, and then brought the material back? Is that correct? Is that the information got from the informant?

A Close. Pretty close.

Q Well, is that correct or isn't it?

A Yes, but he didn't say they flew directly from lower Manhattan.

Q No, I understand that. But they came from lower Manhattan, from the east to the west, picked up the material, and then came back east?

A Yes.

MR. MICHAELSON: I have no further questions.

THE COURT: Anything else?

MR. PANZER: May I ask just a few questions?

I will be very brief.

THE COURT: All right.

md

Klopfer - cross

71

BY MR. PANZER:

Q Agent Klopfer, let me tak you back to November 17, 1975, on 58th Street and Seventh Avenue, where you saw this Buick Electra car. Do you remember that?

A Yes.

Q And you saw two individuals in that car at some point, correct?

A Yes.

Q And these two individuals were passengers, right?

A Now that's three people in the car.

Q Yes, the driver and two passengers.

A Yes.

Q Had you ever seen those two individuals before?

A Negative.

Q The answer is "no"?

A No.

Q Were you using field glasses on that day?

A No, I was not.

Q You say one individual stepped off the curb and brought a package to the car; is that right?

A Yes.

Q How far away were you from that individual?

A Maybe a hundred feet. I was across the city

md

Klopfer - cross

72

street.

Q You say the whole movement with him handing the package into the car took a couple of seconds?

A I didn't testify to that.

Q No. I am asking you.

A He himself, he had the package in his left hand, approximately waist high --

Q I know what happened. I want the time.

A He got into the car. He opened the door and slid into the front seat.

Q How long did that take?

A A few seconds, maybe.

MR. PANZER: I have nothing further.

THE COURT: Anything further?

MR. DAVIS: I have one question on redirect that I think will be a time-saver, your Honor.

REDIRECT EXAMINATION

BY MR. DAVIS:

Q You testified on cross examination by Mr. Lopez, the first of the lawyers who talked to you, that you had a conversation with another agent about his activities on, you believed, November 13, 1975, is that correct?

A That's correct.

Q Who was that agent, and what did he tell you?

md

Klopfer - redirect

73

1 A It was Police Officer Frank Berberich, a member
2
3 of our group in the task force.

4 Q What did he tell you, and just give us the
5 brief substance.

6 A He told me that he had surveillance on the night
7 of the 13th of Mr. Ortiz removing a package, a brown paper
8 bag or a shopping bag, something similar to that, from the
9 trunk of one vehicle and walking over and handing it to a
10 subject who was inside his own Buick.

11 This subject then, I believe now, left the
12 vehicle and placed the package in the trunk of the Buick.

13 Q And would it be fair to say there are other
14 details?

15 THE COURT: Let me hear that.

16 (Record read.)

17 MR. LOPEZ: I object to that. If there are
18 other details, we would like to hear them.

19 THE COURT: Overruled.

20 A Yes.

21 Q Now, did Mr. Berberich say what neighborhood
22 this took place in?

23 A Yes; it was on South 5th Street, between Hooper
24 and I think Keap.

25 MR. DAVIS: That's all.

md

Klopfer - recross

74

MR. LOPEZ: Just two more questions.

RECROSS EXAMINATION

BY MR. LOPEZ:

Q On the basis of that information, did you make an application for a search or arrest warrant on Ortiz?

A I was not working that day.

Q Did you?

A I did not.

Q Do you know, was it indicated to you, whether at that time anyone moved to arrest Ortiz or to search him on that date, November 13, 1975?

A I don't know.

Q You don't know that information?

A No.

MR. LOPEZ: Okay. No further questions, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Any further witnesses?

MR. DAVIS: I don't want to take any more of the Court's time than necessary, but based on what I asked this gentleman I will not call Mr. Berberich, who I intended to call.

The only other witness I intend to call is

md

Rodriguez - direct

75

Angel Rodriguez. Not necessarily for corroboration of what he did in the undercover operation, but he is the first person to have spoken to Mr. Perez and Mr. Gonzalez, and it may be necessary with respect to the voluntariness of Mr. Gonzalez's statement if Mr. Michaelson wants to raise it.

I don't want to take the Court's time unless Mr. Michaelson is raising the issue.

MR. MICHAELSON: I don't know what the gentleman is going to say. I can't stipulate to anything.

MR. DAVIS: I will call the witness.

ANGEL RODRIGUEZ, called as a witness, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Rodriguez, will you tell us in a nice loud voice, because the acoustics are bad here, where you are employed and how long you have been there.

THE COURT: We assume he is an agent, and let's go right to the point.

Q Mr. Rodriguez, will you tell us what you did on the evening of November 17, 1975.

A I went to a location in the area 182nd Street and St. Nicks Avenue.

md

Rodriguez - direct

76

Q What were you driving?

A I was driving a blue 225 Electra Buick.

Q I put before you Government Exhibit 5 in evidence. Did you have that in your possession at that time?

A Yes, I did.

Q Were you in radio contact with other agents at that point?

A Yes, I was.

Q Will you tell us what you did?

A First of all, I was sent there to -- by Sergeant Berberick, and Investigator Klopfer. I was working in an undercover capacity to meet certain individuals who were allegedly waiting for the male driver of this particular vehicle to pay those subjects some money.

Q Tell us what you did, Mr. Rodriguez.

A I drove up to the corner of 182nd Street and St. Nicks. I pulled up to the two subjects that are sitting to my left. I lowered the window, the right hand passenger side of the window, and I yelled out, "Rigo."

At this time Mr. Rigoberto Gonzalez walked towards the car, and I asked him, "Are you Rigo?"

And he said, "Who are you?"

I told him, "I'm a friend of Felix. Felix sent

1 md Rodriguez - direct

77

2 me up here to pay you some money, the money for the stuff."
3 He was going to get into the vehicle, and I told him,
4 "Look, the money -- I've got half the money for you, and the
5 money is in the trunk of the vehicle. I've got to go to the
6 trunk of the vehicle."

7 Q Mr. Rodriguez, what language were you speaking
8 at the time?

9 A Spanish.

10 Q Do you speak Spanish fluently?

11 A Yes, I do.

12 Q Do you see the two gentlemen you saw on the
13 street corner that evening here today?

14 A Yes, I do.

15 Q With respect to the person who you were speaking
16 to, will you point him out, please?

17 A He is the person with the yellow sweater.

18 Q Indicating the defendant Gonzalez.

19 A Yes.

20 Q And the other person on the street corner, do you
21 see him in the courtroom today?

22 A Yes.

23 Q Where is he?

24 A The one in the brown suit.

25 Q At which end of the table is he, left or right?

1 md

Rodriguez - direct

78

2 A To the right of the interpreter.

3 MR. DAVIS: Indicating the defendant Perez.

4 Q What happened next, Mr. Rodriguez?

5 A Mr. Gonzalez told me, "I have a car a block
6 away from this area. You can give me the money there."7 I said, "No deal. This area is too hot. I have
8 the money in the trunk and I want to get rid of it."9 At this time he agreed with me to get the money.
10 I told him that there's \$45,000 due but I told him I had only
11 \$22,000, that he would have to see Felix at a future date to
12 collect the rest.13 At this time I exited my vehicle, I walked
14 towards the trunk of the 225 Electra. At this time I
15 introduced myself to him. I believe I used the name Tony,
16 I believe, and I shook hands with him, and I also met his
17 brother which he called Poncho .18 At this time I opened the trunk of the vehicle.
19 This was the signal to be arrested. I noticed the agents
20 were moving in on us and Rigoberto told Mr. Perez to walk,
21 walk fast away from the car. At this time we were all
22 arrested, and we were all taken down to Varick Street, 201
23 Varick Street.24 Q When you say "we were all arrested, " who was
25 arrested?

md

Rodriguez - direct

79

1 A I was arrested myself, Mr. Gonzalez was
2
3 arrested, and Mr. Perez was arrested.

4 Q When you say you were arrested, you mean you
5 were pretending to be arrested?

6 A Yes.

7 Q What happened after this arrest?

8 A After this arrest we took them to the office.

9 Q What happened on the car ride down?

10 A In the car I still maintained the undercover
11 role, and I told Rigoberto, I said, "What the hell is going
12 on? Were you guys tailed, or anything like that? Somebody
13 wants to write us off."

14 This is what I told Mr. Rigoberto. Mr.
15 Rigoberto says that there was a guy caught in the airport
16 before sometime during the week, that maybe he was the one
17 who gave the information.

18 During this time Mr. Rigoberto also stated that
19 they could prove nothing on him, that they didn't get him with
20 nothing, and that for me not to worry. I told him that I was
21 worried. I also told him that I would like to make my own
22 contact with him in the future if we ever beat this case so
23 I can go to wherever he came from to negotiate a deal.

24 Q Who else was in the car other than you and Mr.
25 Perez and Mr. Gonzalez?

1 md Rodriguez - direct

2 A Police Officer Phil Alba, and the state
3 investigator, Lawrence McDonald.

4 Q What, if anything, did they do or say?

5 A Well, Police Officer Phil Alba gave the rights,
6 and I interpreted them.

7 Q When was this?

8 A As soon as we got in the vehicle.

9 Q As soon as you got in the car?

10 A Yes.

11 Q And what happened?

12 A Well, he advised him of his rights, and Rigoberto
13 said he understood everything. Mr. Perez was shook up, so
14 I had to explain to him in Spanish.

15 Q What happened when you got to your head-
16 quarters?

17 A We took them into two separate rooms. At this
18 time I left the room, I was called out of the room. I came
19 back as a detective. I showed my shield to Rigoberto --

20 Q Who else was in the room at that point?

21 A At this time there was Special Agent John
22 Mullin was inside, and State Investigator Lawrence
23 McDonald.

24 Q Was Mr. Perez in the room at that point?

25 A I was in the room just with Rigoberto.

1 md

Rodriguez - direct

81

2 Q Where was Mr. Perez at that point?

3 A In a different room.

4 Q What if anything did you say to Mr. Gonzalez
5 at that point?6 A I told Mr. Gonzalez -- first of all, I showed
7 him my shield, told him I was a real detective, and advised
8 him of his rights again.

9 Q How did you do that?

10 A I read the rights to him that Special
11 Investigator Donald Klopfer handed me some paper, some card,
12 and I read it to him in Spanish and English.

13 THE COURT: To whom did you say?

14 THE WITNESS: Special Investigator Donald
15 Klopfer handed me the card, and I read the rights to Mr.
16 Rigoberto Gonzalez.17 Q Showing you Government Exhibit 7 for identifica-
18 tio., is this a copy of the card you used?

19 A Yes.

20 Q In Spanish?

21 A Yes.

22 Q You say you read it to him in Spanish and
23 English?

24 A Yes, I did.

25 Q Did you read everything on this card?

1 md

Rodriguez - direct

82

2 A Yes, I did.

3 Q What did Mr. Gonzalez say?

4 A He said he understood but there was no need for
5 it because he was innocent.

6 Q I couldn't hear you.

7 A He said there was no need for it because he
8 was innocent -- "I don't know why you got me here."

9 Q What happened next?

10 A Then we searched him, Special Agent John Mullin
11 and myself, and once we got to his wallet I found --

12 THE COURT: We have all that about the card.

13 Q We will pass over the search, Mr. Rodriguez.
14 Did you have any further conversation with Mr. Gonzalez that
15 night?

16 A Yes, I did.

17 Q What was that conversation?

18 A Well, I told Mr. Gonzalez that we -- it was
19 perfectly clear to him, of course, that we had him dead to
20 rights, that we had him in a conversation with me when I went
21 to pay the money, and we had him on observations, and I asked
22 him if he wanted to cooperate.23 I said, "Would you like to cooperate with our
24 office? Would you like to -- I understand that you have
25 been caught with this amount of heroin. I'm sure you know a

1 md

Rodriguez - direct

83

2 lot of big people wherever you come from."

3 Q And what did he say?

4 A He said, "Well, first of all, I don't want to
5 talk about this case that you have got me on here. This,
6 I don't want to talk about at all."

7 He said, "There are people" -- he said, "There
8 are people in Los Angeles or California or wherever who do
9 deal in narcotics, but, " he says, "but if you let my brother
10 and I go now, if you let my brother and I go now, I'll call
11 you back in two or three days and" --

12 THE COURT: Let me interrupt. There is all this
13 trouble about that statement. I don't see that that
14 statement -- you have either got a case or not. If you don't
15 have a case that statement by Gonzalez, so-called, about him
16 going to California, that isn't even worth struggling about.

17 MR. DAVIS: I do intend to use it, your Honor.

18 THE COURT: I don't know why you do. What does
19 it add?

20 MR. DAVIS: In the context of this case it will
21 add something, but I will not press the point here if your
22 Honor doesn't agree with me.

23 THE COURT: The motion is to suppress the
24 statement, and I am really suggesting that I think it is such
25 a trivial part of your case I don't think it means a lot.

1 md

Rodriguez - direct

84

2 You either have a case or you don't, depending on what the
3 jury believes, and if the other witness is admissible that's
4 eyewitness evidence. To have this statement casually given
5 about "I'll go to California," I just don't think it is worth
6 the struggle, really.

7 MR. DAVIS: All I can say is I thought about
8 it, and based on my experience I thought it would be helpful
9 to me with a jury in this case, and I do intend to offer it
10 in evidence.

11 THE COURT: Please continue.

12 Q Mr. Rodriguez, I am putting before you what has
13 been marked Government Exhibit 8 in evidence. Would it be
14 fair to say that that is a card that you found on Mr.
15 Gonzalez that night?

16 A Yes, it is.

17 Q Did you have any conversation with him about
18 that card?

19 A Yes, I did.

20 Q What did you say and what did he say?

21 A Well, I asked him if this was the telephone
22 number of the subject Felix, and he says, "Tony, I don't know
23 anything about that card, I never saw it."

24 Q Did you ask him if he knew Mr. Ortiz?

25 A Yes.

1 md Rodriguez - direct 85

2 Q What did he say?

3 A He said he didn't know him.

4 Q Did you talk to him about the person whose name

5 appears on the front of the card?

6 A Yes. The name Alvin Mitchelson, attorney at

7 law.

8 MR. MICHAELSON: I will stipulate for the

9 record the name is Michaelson.

10 THE COURT: Yes.

11 Q What did he say? What did you say to him about

12 that name, and what did he say?

13 A I asked him if he can call his lawyer, and if I

14 could speak to his lawyer so I can explain to his lawyer

15 exactly what we had him on and to see if he wants to

16 cooperate.

17 Q What did he say?

18 A He said that his wife -- first of all, he neg-

19 lected this card at all, he didn't know anything about the

20 card.

21 The card, he didn't know how it got there, and

22 I asked him who was his attorney. He told me his attorney

23 was an attorney in California. I also asked him if I could

24 speak to his attorney, and he said, "No, my wife will get in

25 contact with him."

1 md

Rodriguez - direct

86

2 Q At any time during the conversation that you
3 have described so far, Mr. Rodriguez, did he ever ask you to
4 stop talking because he wanted to talk to his lawyer?

5 A No.

6 Q And did there ever come a time that night when
7 he said he wanted to talk to his lawyer?

8 A Yes.

9 Q What did you do at that point?

10 A At that point we told him, "We'll see you
11 tomorrow in court."

12 Q I'll try to save time. The next day did there
13 come a time you were in Mr. Bannigan's office?

14 A Yes.

15 Q Was Mr. Gonzalez there?

16 A Yes.

17 Q Did Mr. Bannigan advise him of his rights
18 further?

19 A Yes.

20 Q And did you translate at least portions of that
21 for Mr. Gonzalez?

22 A Yes, I did.

23 Q Now, Mr. Rodriguez, I am putting in front of you
24 what has been marked Exhibit 9, Government Exhibit 9 for
25 identification. Is this a form that Mr. Bannigan was filling

1 md Rodriguez - direct 87
2 out when you were talking with Mr. Gonzalez?

3 A Yes, it is.

4 Q And do you recollect yourself -- and I am not ask
5 ing you to look at the form -- whether Mr. Bannigan asked
6 him all the questions on the form?

7 A Yes, he did.

8 Q And do you yourself recollect whether or not
9 Mr. Gonzalez made the answers that appear there?

10 A Yes.

11 MR. DAVIS: I will offer this in evidence,
12 your Honor, and I have no further questions of this
13 witness.

14 MR. MICHAELSON: I have some questions.
15 Shall I do that now?

16 THE COURT: Yes.

17 MR. MICHAELSON: I will try to be brief.
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Rodriguez - corss

88

2 CROSS EXAMINATION

3 BY MR. MICHAELSON:

4 Q Agent Rodriguez, have you had a chance to look
5 at your statement? Have you had a chance to review the
6 written statement you made on November 18, 1975?

7 A Are you referring to the investigation report?

8 Q Yes. Did you have a chance to take a look at
9 that?

10 A Yes.

11 Q I don't want to go into all the details of that,
12 but there is nothing about Rigoberto saying to you anything
13 about the stuff. There is nothing in there about that, is
14 there?

15 A Well, that was mentioned to the U. S. Attorney.
16 That was said to the U. S. Attorney.

17 Q I know it was mentioned to the U. S. Attorney,
18 and all that, but there is nothing in there about that, is
19 there?

20 A No, there is not.

21 Q Directing your attention to after your arrest --
22 okay? Now, you have been arrested, right?

23 A Right.

24 Q Did you tell Mr. Rigoberto Gonzalez and Mr. Perez
25 that you were a police officer at that time?

1 md

Rodriguez - cross

2 A At that time, no.

3 Q You did not. You engaged them in conversation,
4 is that right?

5 A Yes, sir.

6 Q And you were pretending to be one of the
7 defendants, is that correct?

8 THE COURT: He said that.

9 Q And it is after that that Mr. Gonzalez said
10 some of the things you say he said to you, is that right?

11 A I mentioned that on the record before.

12 Q What you said before?

13 A Yes.

14 Q And this was afterwards?

15 A This was in the car.

16 Q While you were driving down?

17 A Those certain things I mentioned on the record.

18 Q When did you read the rights to him? Was that
19 in the car, too?

20 A I was the interpreter of the rights. I am sure
21 Mr. Rigoberto will tell you that.

22 • Q No. You just tell us what you have to say.

23 A I was the interpreter. Police Officer Alba told
24 us we were under arrest, and I told Alba, "I speak English.
25 I'll interpret for them."

1 md

Rodriguez - cross

99

2 Q Did Mr. Gonzalez speak to you in English or in
3 Spanish?

4 A He spoke English a couple of times to the --

5 Q To you, to you, to you.

6 A No. He spoke Spanish.

7 Q He spoke Spanish to you?

8 A That's right.

9 Q Did he have difficulty speaking to you in
10 Spanish?

11 A No.

12 Q Did he have difficulty speaking to you in
13 English?

14 A Well, he didn't speak to me in English.

15 Q In the car he spoke to you only in Spanish;
16 is that right?

17 A Right. I have to answer that he spoke Spanish
18 because he didn't want the officers to understand. I
19 suggested that to him myself.

20 Q You suggested that he speak in Spanish?

21 A Correct.

22 Q You didn't tell him you were a police officer
23 then, did you?

24 A No, not at that time.

25 Q When did you first tell him you were a police

1 md

Rodriguez - cross

100

2 officer?

3 A When he was in the room at 201 Varick Street.

4 Q And did you then remind him of what he had said
5 to you while you were acting as a defendant?

6 A Well, I told him -- once I told him I was a
7 police officer, I advised him of his rights.

8 Q That is not the question I am asking. I hate to
9 interrupt you. Try to listen to what I say okay?

10 The question now is: After, after you told him
11 you were a police officer, okay, you read him his rights at
12 that point?

13 A Yes.

14 Q Did you tell him, "Now you said certain things
15 to me before. Do you remember them?" Did you discuss that?

16 A The first thing when I got to the office -- the
17 purpose wasn't to get evidence against the defendant; the only
18 purpose was that I worked undercover in the area and I wanted
19 to make sure if people saw they didn't think I was an
20 informer or think I was an officer, so of course I was
21 arrested.

22 Q I am asking you a different question. I am
23 asking you whether you told Mr. Gonzalez, whether you reminded
24 him of the conversation that you had had inside the car.
25 Did you mention the conversation to him?

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Rodriguez - cross

101

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A Honestly --

Q Yes, honestly.

A I would say I did talk to him about the car;
that was mentioned.

Q And you did mention some of the things that he
mentioned to you in the car.

A I only mentioned the car because that was --
the only thing we were looking for was the car.

Q Did you say anything to him to the effect,
"Do you remember what you said to me in the car?"

A No.

Q "Now I am a police officer, what do you have
to say?"

A No. And I have witnesses to prove that.

Q I know that, but I am asking you did you do it?

A No.

Q Directing your attention -- he said to you he was
innocent at that time, is that not correct? Is that whne he
said he was innocent?

A When I showed him my shield and told him I was
a detective.

Q Then he said he was innocent?

A Yes.

Q When you got to the U. S. Attorney's office the

1 md Rodriguez - cross 102
2 next day, what time did you get there?

3 A Well, if I remember we went to the detention
4 facility here next door, and the two defendants were having
5 lunch --

6 Q I don't think you understand the question, Mr.
7 Rodriguez. Maybe I am not clear.

8 THE COURT: This is going on and on and on.

9 MR. MICHAELSON: I have very few questions.

10 THE COURT: It really isn't your fault.

11 Look, Mr. Davis, this so-called statement that
12 he will get people in California, is it in any written
13 report?

14 MR. DAVIS: No. That's been established.

15 THE COURT: This is such a -- I can't understand
16 the government even wanting to use it. It would be a beautiful
17 subject for impeachment. "And why wasn't it in the report,
18 if it was important enough?" and on and on. And then all this
19 murky thing about the fellow not disclosing he was a policeman
20 and acting as the interpreter for the rights, and all that.

21 This is a heyday for the -- you know, I am not
22 trying to mastermind anybody's case, but I think this ought to
23 be out. I think it is of very negligible value to the
24 government, to say the least, and I don't know that I would
25 suppress it, but I think it is somewhat questionable. It was

1 md

Rodriguez - cross

103

2 never recorded anywhere, it is very ambiguous as to what it
3 means in the circumstances under which it was given, and the
4 motivation and whether it really means anything. I think it is
5 really meaningless.

6 MR. DAVIS: I would like to remind the Court
7 Mr. Gonzalez at the time also said he did not know Felix
8 Ortiz, which is a perfect false exculpatory statement in the
9 lawbooks.

10 THE COURT: I know the lawbooks, but if you get
11 to put on the case, which I still have to worry about, you've
12 got eyewitness testimony about a transaction. This witness
13 went over and looked out the window and he called, "Rigo,"
14 and he comes up and says he is ready to pay him thousands
15 and thousands of dollars, and you worry about putting on some
16 silly so-called admissions or exculpatory statements made
17 afterwards.

18 MR. DAVIS: All I can say is it is my responsi-
19 bility to bear the risk of trying this case.

20 THE COURT: Well go on and on with this.

21 MR. MICHAELSON; I will try to be brief.

22 THE COURT: This is just very murky, and I don't
23 blame you at this point at all.

24 I barely understand -- the witness is difficult
25 to understand, his English is broken, and it is a very confusing

1 md Rodriguez - cross 104
2 situation which I will readily admit to you, and if the jury
3 has the same reaction, congratulations.

4 BY MR. MICHAELSON:

5 Q Directing your attention, Mr. Rodriguez, to your
6 time in the office with Mr. Bannigan, do you remember what
7 time that was?

8 A I believe it was after twelve o'clock.

9 Q Were you in that office with Mr. Bannigan?

10 A Yes, at one time I was.

11 Q Was that conversation in English or in Spanish?

12 A Which conversation are you referring to, sir?

13 Q I am referring to the conversation in Mr.
14 Bannigan's office with Mr. Gonzalez and with you being
15 present. Do you understand which one I am talking about
16 now?

17 A Yes, the conversation on Bannigan's side was
18 in English, and my side was in Spanish, and some of the
19 questions were asked in English and Mr. Rigoberto said that he
20 understood, and the ones that he didn't understand I inter-
21 preted for him.

22 MR. MICHAELSON: May I approach the witness,
23 your Honor?

24 THE COURT: Yes.

25 Q I want you to take a look at the top of

1 md Rodriguez - cross 105
2 Government's Exhibit No. 9, and do you see a statement on top
3 of that on the right hand side? I ask you to read it very
4 carefully.
5 A "Translation done by Detective Rodriguez
6 whenever defendant noted he did not understand English."
7 Which is exactly what I said.
8 Q Now, let me ask you this. Do you know which
9 questions Mr. Gonzalez indicated he did not understand?
10 A I have to look at it.
11 Q Look at it very carefully. Is there a record of
12 which ones he said he understood and which ones he said he
13 did not understand?
14 A Yes, there is.
15 THE COURT: We will take a short recess.
16 (Recess.)
17 THE COURT: Incidentally, nobody briefed the
18 question of the necessity of getting a warrant on the basis
19 of November 13th. I have looked through all the briefs.
20 There is not a word about it.
21 MR. PANZER: Might I be heard? The first time
22 we became aware of this is when I was handed that memorandum
23 yesterday. We were not given the 3500 material, we were not
24 privy to --
25 THE COURT: You have a description of the

1 md

Rodriguez - cross

106

2 November 13th observation.

3 MR. LOPEZ: Just as an overt act, your Honor.

4 MR. PANZER: We didn't know what happened.

5 MR. LOPEZ: We didn't know anything about any
6 other individuals in a car. All we knew is a brown paper bag
7 had been removed from a Thunderbird and that was near the
8 grocery store in which defendant worked.

9 THE COURT: That is just not correct. I have
10 a brief filed by Frank A. Lopez, page 2 of which says,
11 "On November 13, 1975, Ortiz was seen in the vicinity of
12 South 5th and Keap Streets, Brooklyn, removing a brown paper
13 bag from a Ford Thunderbird. The contents of the brown paper
14 bag are unknown" -- and so forth.

15 MR. LOPEZ: Yes.

16 THE COURT: Apparently, you walked into court
17 today prepared to say that there should have been a search
18 variant on the basis of the November 13th --

19 MR. LOPEZ: Yes, on the basis of the government's
20 memorandu of law which I saw today.

21 THE COURT: What are your cases on that? You
22 are making a legal argument here, and I need some authority.

23 MR. LOPEZ: There is a case, I think U. S. V.
24 Soriano, out of the 8th Circuit, as I recall. Co-counsel has
25 mentioned a case --

1 md

Rodriguez - cross

107

2 THE COURT: You think about the case while we
3 have a recess.

4 (Recess.)

5 BY MR. MICHAELSON:

6 Q Mr. Rodriguez, do you still have in your
7 possession Government's Exhibit 9?

8 A Yes.

9 Q Have you had a chance to review Government
10 Exhibit 9?

11 A Yes.

12 Q Can you tell me which portions of Government
13 Exhibit 9 Mr. Gonzalez indicated he didn't understand and which
14 ones he did understand, which questions, and how did you
15 come to that conclusion?

16 A I came to that conclusion --

17 Q First -- excuse me -- first tell us which ones
18 he did understand and which ones he didn't understand.

19 A Well, it was up to the --

20 Q Excuse me --

21 A I have to answer that question with an explana-
22 tion of why I came to that conclusion.

23 THE COURT: I don't understand. We are going to
24 be here all afternoon. Will you please start responding to
25 the lawyer's questions directly? Don't give any peripheral

1 md Rodriguez - cross 108
2 explanations, and leave it up to me to figure out what it
3 all means.

4 THE WITNESS: There's more to this question
5 because Mr. Bannigan himself told me I speak Spanish to the
6 defendant in order that he fully understood the contents of
7 the questions.

8 Q In other words, you spoke strictly Spanish
9 throughout this entire situation, is that right?

10 A The first two questions were in English, and
11 the rest was in Spanish, the contents. The first two
12 questions were in English.

13 Q The first two questions regarding whether he
14 understood his constitutional -- whether he understood his
15 constitutional right to refuse to answer any of the questions,
16 that was in English?

17 A Yes.

18 Q And his answer "yes" was also in English?

19 A Yes.

20 Q And the rest of it was in Spanish?

21 A Correct.

22 Q How long were you in there with Mr. Gonzalez
23 and Mr. Bannigan?

24 A Well, I was with Mr. Bannigan about fifteen
25 minutes.

1 md Rodriguez - cross 119

2 Q Did you come in with Mr. Gonzalez into that

3 room with Mr. Bannigan?

4 A Detective Investigator Klopfer brought him in

5 first.

6 Q Did you go in at the same time as Klopfer?

7 A Well, he brought him in, and then I was called

8 in.

9 Q You were called in how long after Mr. Gonzalez

10 went in there?

11 A About one minute.

12 Q About one minute?

13 A Yes.

14 Q When you came in there you were there with Mr.

15 Bannigan, Mr. Gonzalez, and Mr. Klopfer, for about fifteen

16 minutes?

17 A No, I was there with just Mr. Bannigan.

18 Q Mr. Klopfer was not in there at all?

19 A Mr. Klopfer came in momentarily, but he had to

20 stand watch over Mr. Perez, who was outside sitting down.

21 Q So he left almost immediately?

22 A Correct.

23 Q Did Mr. Bannigan get up and leave at any time?

24 A Yes.

25 Q While you were in there with Mr. Gonzalez?

1 md

Rodriguez - cross

110

2 A After he questioned him he got up and left.

3 Q While the questioning was going on was Mr.

4 Bannigan there all the time?

5 A Yes, I believe he was.

6 Q Was Mr. Klopfer there all the time?

7 A No.

8 Q Was he there at any time after the first two
9 questions here on Government's Exhibit 9?

10 A No, I don't believe so.

11 MR. MICHAELSON: I have nothing further of this
12 witness, your Honor.

13 THE COURT: Anything else, Mr. Panzer?

14 MR. PANZER: I have no questions.

15 THE COURT: Any redirect?

16 MR. DAVIS: No redirect, your Honor.

17 THE COURT: Step down.

18 (Witness excused.)

19 MR. DAVIS: I have no further witnesses.

20 The government rests on this point.

21 THE COURT: Is there any further evidence?

22 MR. LOPEZ: Your Honor, the only thing I want to
23 make sure, and we can deem it marked, is that all the evidence
24 is before the court so your Honor can properly either suppress
25 or deny the application, as it deems fit. I want to make sure

1 md

2 the exhibit as far as the narcotics here are concerned includes
3 both what was in the car and taken from the possession of the
4 defendant, and I am also prepared to stipulate --

5 THE COURT: Let's pause on that.

6 Is all the narcotic evidence that you seek to
7 introduce in evidence at this hearing?

8 MR. DAVIS: No. I asked the Court whether I
9 should go through introducing it in evidence, and I had the
10 impression you did not want it. He described it all. It is
11 not all in evidence, but I think we know what we are talking
12 about.

13 MR. LOPEZ: I want to stipulate to it being
14 in evidence for the purpose of this hearing.

15 MR. DAVIS: Fine.

16 THE COURT: In other words, you are trying to
17 have it in the record so that there is a specific focus on
18 a specific piece of evidence.

19 MR. LOPEZ: That's correct.

20 Likewise, your Honor --

21 THE COURT: What else do you have? I take it
22 you don't have it in this room right now.

23 MR. DAVIS: I have the agents outside, but the
24 heroin seized in the car was divided into two packages.

25 THE COURT: So there is a second package of

1 md

2 heroin. We will deem that marked as Government's Exhibit
3 No. --

4 MR. DAVIS: It goes with 3.

5 THE COURT: We will call it 3-A.

6 MR. DAVIS: There was also a small amount of
7 heroin described as coming from Mr. Ortiz's person.

8 MR. LOPEZ: May that be 3-B?

9 THE COURT: All right, that will be 3-B?

10 MR. DAVIS: There was also the cocaine found on
11 Mr. Gonzalez.

12 MR. MICHAELSON: Apparently from what I gather
13 there is going to be some claim it was taken from Mr.
14 Gonzalez's wallet subsequent to his arrest.

15 MR. DAVIS: Right.

16 THE COURT: We will call that the next number,
17 which will be 10.

18 Was 9 admitted?

19 MR. DAVIS: I offered it.

20 THE COURT: There is a 9 for identification.
21 Is there any objection to 9?

22 MR. MICHAELSON: No objection, just on the basis
23 of what we have done before.

24 THE COURT: All right. 9 is received.
25

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2 (Government Exhibit No. 9 was received in
3 evidence.)

4 THE COURT: The government will get 3-A and
5 -B marked promptly with the tags, and those exhibits are
6 deemed admitted.

XX

7 (Government Exhibits Nos. 3-A and 3-B deemed
8 received in evidence.)

9 THE COURT: Government's Exhibit 9 is admitted
10 for this hearing.

11 Then we want to have Government Exhibit 10,
12 which is the cocaine allegedly seized from Mr. Gonzalez,
13 right?

14 MR. DAVIS: That's true, your Honor.

15 THE COURT: Okay. That will be deemed received
16 for the purposes of this hearing.

XXX

17 (Government Exhibit No. 10 was deemed received in
18 evidence.)

19 MR. DAVIS: There is also a seizure from the
20 safe deposit box. I understand from Mr. Lopez's not raising
21 an independent question as to anything found in there.

22 MR. LOPEZ: I do want it marked. I will
23 stipulate it is before this court for the purposes of this
24 hearing.

25 THE COURT: We will have it deemed marked

1 md

2 Government Exhibit 11, just for reference purposes, and that
3 is received.

4 (Government Exhibit No. 11 was deemed received in
5 evidence.)

6 MR. LOPEZ: We have no other applications.

7 The defendant Ortiz rests on the motion.

8 MR. MICHAELSON: I will rest, your Honor.

9 MR. PANZER: The defendant Perez rests, your
10 Honor.

11 THE COURT: Let me just discuss this question of
12 law. Mr. Davis has referred us to U. S. v. Watson, decided
13 by the Supreme Court January 26, 1976. That was a case
14 where there was a warrantless arrest by a postal inspector
15 pursuant to a specific statute that provided for arrests
16 without warrants.

17 The court held that that was constitutional, and,
18 furthermore, went on and discussed the general Fourth
19 Amendment question, and in the slip opinion -- I am referring
20 to pages 5 and 6 -- and it seems to me very clear what they
21 are saying is that an arrest for a felony with probable
22 cause simply does not require a warrant.

23 I am just reading this case. The usual rule is
24 that a police --this is quoting from an earlier Supreme
25 Court case -- the usual rule is that a police officer may

1 md

115

2 arrest without warrant one believed by the officer upon
3 reasonable cause to be guilty of a felony.

4 Referring to the Carro v. United States -- and I
5 won't give the citations -- that's all here. Then they
6 refer to another case, a 1959 case, Henry against United
7 States, where they say the court declared, and so forth.
8 I am skipping around.

9 But the court in this United States v. Watson
10 says, "A necessary inquiry, therefore, was not whether there
11 was a warrant or whether there was time to get one but whether
12 there was probable cause for the arrest," and so forth and
13 so on.

14 That's the Supreme Court.

15 MR. LOPEZ: Your Honor, may I address myself to the
16 evidence?

17 THE COURT: Yes.

18 MR. LOPEZ: Your Honor, ever so briefly, Ortiz
19 makes a two-prong attack in support of his motion to
20 suppress.

21 One, he says there is insufficient probable cause;
22 and, two, he indicates this was a warrantless arrest, and
23 that there was time and opportunity to get a warrant.

24 Your Honor, we have several factors that we must
25 consider to ascertain whether the officers arose to the level

1 md

116

2 of probable cause to effect the arrest here. We have an
3 informer not proved reliable who is under arrest who is
4 trying to make a deal for himself and gives information
5 not specific as to what is going to take place in the future,
6 which can be verified, but as to what happened according to
7 him in the past.

8 Obviously, the informant's information is not even
9 correct in several factors. This deal takes place in
10 midtown Manhattan, as a matter of fact. The officers'
11 surveillance indicates that nothing is taking place in
12 lower Manhattan. So the informant's reliability here at most
13 is very questionable.

14 What in fact do they see? They see on November
15 13th Ortiz, who works for a grocery store, going to a
16 Thunderbird, taking out a brown paper bag, and giving it to
17 an occupant in an automobile, in his Buick Electra. That's it.

18 At that point, November 13th, the government can't
19 have it two ways. They did not move in on Ortiz at that
20 time and arrest him. They did not even at that time say,
21 "Well, here we have now another situation. Let's find out.
22 Let's get a warrant on those factors."

23 Had they brought a warrant to your Honor on those
24 factors, I think the Court may have been very reluctant to
25 issue a warrant to search Ortiz on those observations.

1 md

117

2 But what now happens on November 17th to raise this
3 to the level of probable cause? First now they still
4 haven't done anything about a warrant. From November 13th
5 to 17th they have not made any additional observations,
6 and now on November 17th in the busiest commercial section
7 of this city they see two people at one point, and then at
8 another point, get into a car with a brown paper bag, which is
9 not unusual for this section of the city -- get into
10 Ortiz's car.

11 When they stop Ortiz on First Avenue and 34th
12 Street near the Midtown Tunnel they don't arrest Ortiz
13 immediately, they go for the bag. They look in the bag.
14 They see what they believe to be heroin. Then operating on
15 that hunch which now is proving fruitful, your Honor, they
16 arrest Ortiz and we have a domino theory of post arrest
17 statements, the search of the box, etc.

18 The government can't have it both ways. On
19 November 13th they didn't move in because they only had
20 suspicions not rising to the level of probable cause, or if
21 they had more than that they didn't bother to get a
22 warrant.

23 November 17th nothing more is added. They don't
24 have any information, they don't have any advance tip. All
25 they have is Ortiz in an automobile with two individuals with

1 md

2 no prior narcotic history, unknown to them who these
3 individuals are getting into a car, and apparently, your
4 Honor, leaving a brown paper bag behind.

5 When Ortiz is approached in his car he is taken
6 out of the car, he is not placed immediately under arrest,
7 but they go for the brown paper bag, they look in, and
8 then he is arrested.

9 I submit here we have a case of insufficient
10 probable cause, and, therefore, the motion should be granted,
11 or, secondly, an insufficient act on the part of the
12 government, your Honor, in not obtaining a warrant.

13 From what your Honor has said, and to conclude,
14 in United States v. Watson we have no dispute on that because
15 they had probable cause to arrest. Under Preston, Coolidge,
16 and all of those cases, naturally they had the right to
17 secure the defendant and search the immediate area. They
18 didn't do that here. They wanted to see what was in the
19 brown paper bag. Once they saw it was fruitful, they
20 arrested Ortiz. You can almost surmise they would have let
21 him go had there only been fruit or bananas in that bag.
22 That is obvious. That is the point here.

23 Thank you very much, your Honor.

24 MR. PANZER: Might I add to Mr. Lopez, though he
25 has been very eloquent?

1 md

119

2 The Watson case does not dispense with the
3 requirement to get a search warrant when you are going to
4 search a car. The Supreme Court did not say that. They
5 said you can only dispense with that with respect to moving
6 vehicles when there are exigent circumstances.

7 They had just as much on November 13th as they had
8 on November 17th, so they could have applied for a search
9 warrant.

10 In fact, in the Coolidge case, where they did not
11 apply for a search warrant and there was an arrest based
12 on probable cause outside the car, the Supreme Court of the
13 United States said even though they searched the car
14 afterwards they should have gotten a warrant to search that
15 car.

16 So it doesn't leave it to the officer to dispense
17 with a search warrant under the Fourth Amendment just because
18 they have probable cause to arrest somebody; they still have
19 to have the probable cause to arrest the vehicle and they
20 have to have a search warrant to do that.

21 If they can show exigent circumstances why they
22 couldn't get a search warrant then maybe they could be
23 sustained, but they haven't shown that on this hearing before
24 your Honor, and I add that.

25 THE COURT: he was about to go into the Queens-

1 md
2 Midtown Tunnel, and they arrested him, and they had seen
3 the transfer of a bag, and they go get a search warrant?
4 What do they do?

5 MR. PANZER: They could have gotten the search
6 warrant on the 13th when they made the other observation.

7 THE COURT: You are not saying it should have been
8 gotten on the 17th?

9 MR. PANZER: Of course not. They could have gotten
10 it on the 13th, and been ready, and then they would have had
11 a right to enter the vehicle.

12 MR. MICHAELSON: The difference between Watson
13 and this case is here we are talking about the right to
14 search a vehicle, and that indicates what he did here was
15 search a vehicle and then arrest somebody, and that is
16 a critical difference to Watson.

17 THE COURT: What do you mean first they searched
18 the vehicle and then arrested?

19 MR. MICHAELSON: First they stopped the car, and
20 as I heard the testimony they immediately opened the door
21 and grabbed the package, and then they placed, he specifically
22 said "and then we placed Mr. Ortiz under arrest."

23 I think that is a critical difference.

24 THE COURT: I didn't get that distinction.

25 MR. MICHAELSON: At any rate, going on to the point

1 md

121

2 I am obviously most concerned about, a lot would depend
3 upon your Honor's ruling, obviously --

4 THE COURT: Let's focus on your situation on
5 Gonzalez's statement.

6 MR. MICHAELSON: It seems to me clearly as soon as
7 he was under arrest what happened here was he was entitled
8 to be advised of his rights and to be told there was a
9 police officer present, and to be told all of those things
10 which this man did not know. Rodriguez did not tell him
11 that. By his own testimony he said, "I happen to be your
12 friend, I happen to be a defendant here, also. I am just
13 interpreting for you."

14 At that point he had to inform him he was a police
15 officer, which he did not do. Anything said after that,
16 it seems to me, is clearly inadmissible. First of all, he
17 had the right, at that precise moment, to have an attorney,
18 because there was a police officer interrogating him. He
19 didn't say he was giving up his rights. There is no indica-
20 tion, no statement by Rodriguez, that he said, "Okay, Mr.
21 Rodriguez, I am going to give up my rights, I am going to
22 talk to you."

23 Of course he didn't say that, because Rodriguez
24 didn't say he was a police officer. Rodriguez said to him,
25 "I happen to be a defendant, too. just like you."

1 md

122

2 THE COURT: As I understand it, the two times that
3 Gonzalez is said to have uttered the statements about going
4 to California occurred -- they didn't occur in the car,
5 did they? They occurred where?

6 MR. DAVIS: They both occurred sometime after
7 he arrived at headquarters, and knew that Mr. Rodriguez was
8 a policeman.

9 THE COURT: They occurred --

10 MR. DAVIS: The first time they occurred was on the
11 night of November 17th at Task Force Headquarters, and the
12 next day.

13 THE COURT: The evidence is they had been given Mir-
14 anda rights before each of those.

15 MR. DAVIS: Yes.

16 MR. MICHAELSON: I have two arguments.

17 First of all, that trickery, that kind of situation,
18 clearly violates Miranda, Messiah, and all the other cases
19 involving this kind of situation, and that anything that
20 happened thereafter is tainted by that original statement.

21 Even the officer himself said that it was brought
22 to his attention, it was brought to Mr. Gonzalez's attention,
23 by the officer himself to the effect that what had been said
24 in the particular vehicle. He testified to that on direct
25 examination. So anything that took place thereafter is

1 md

2 tainted.

3 I would also indicate to your Honor that Mr.
4 Bannigan conducted the interview in Spanish with Rodriguez,
5 and I would also indicate to your Honor that Rodriguez was
6 under the impression apparently that he did not understand
7 English, he conducted his statements all in Spanish.
8 Klopfer said he doesn't understand Spanish, so that the
9 statement on the first evening which Rodriguez says is in
10 Spanish Klopfer says is in English. You can't have it both
11 ways. It was either in Spanish or in English.

12 THE COURT If the government was seeking to
13 introduce statements made by Gonzalez after the arrest
14 while Gonzalez was still posing as a --

15 MR. MICHAELSON: You mean Rodriguez, sir.

16 THE COURT: Let me start again.

17 If the government were seeking to introduce
18 statements of Gonzalez made to Rodriguez while Rodriguez
19 was still posing as a cohort, and this occurred after the
20 arrest, I think that I would suppress it without question.
21 But I do think that there does come a time when, let's call
22 it the fruits of that situation, or the causal effect of
23 that situation, is probably dissipated. In other words,
24 if you get to the office, Rodriguez shows his badge, and
25 says, "I am really a detective," and if after that in the

1 md

2 presence of Klopfer and Rodriguez +- and I hope I am
3 using the names right -- if the officers after full
4 disclosure of Rodriguez's role ask questions, ask if
5 Gonzalez wants to cooperate, and he makes the statement about
6 going to California, and he denies knowing Felix, and all,
7 I really can't conscientiously say that this all is just the
8 fruit of the deception.

9 MR. MICHAELSON: May I be heard on that briefly,
10 your Honor?

11 THE COURT: Yes.

12 MR. MICHAELSON: Perhaps, as your Honor puts it,
13 it may not be so, but what we have here, at least so far as
14 I heard the evidence, that they used, that Rodriguez in a
15 sense said to Mr. Gonzalez, "The jig is up. You told me
16 these things before. I am now telling you that I am a police
17 officer."

18 In other words, what he is saying to Mr. Gonzalez
19 at that point, assuming everything you say is correct -- what
20 he is saying to him is there's no point in you now failing to
21 disclose anything because I got you, you told me all of these
22 things before you knew I was a police officer.

23 So what I am saying is that the taint here is very,
24 very real. The taint goes past a mere giving of the rights
25 again. The taint goes to the point of saying, "Sure you don't

1 md

125

2 have to say anything, but remember me, I'm the guy you just
3 said all of those things to, and I am a police officer."

4 If not said in those particular words, clearly it
5 has that effect, and Mr. Rodriguez indicated he did mention
6 that.

7 THE COURT: That's a little subtle, but the important
8 things that were said by Gonzalez were said on the street
9 before the arrest.

10 MR. MICHAELSON: That may very well be, but we are
11 not concerned with that at the moment.

12 THE COURT: What was said that was so devastating
13 and psychologically powerful that would lock Gonzalez in,
14 so to speak? What was said after the arrest during the
15 trickery, so-called?

16 MR. MICHAELSON: I have to indicate to your Honor
17 that as far as I am concerned it never happened, and I will
18 indicate that the evidence seems to indicate that. The
19 Bannigan situation with Klopfer supposedly in the office and
20 Bannigan leaving turns out to be completely different.
21 It is Bannigan in the office and Klopfer never in the office
22 when the statements are allegedly made.

23 I would say it is almost impossible for your Honor
24 to believe the statements were made, but that is not the issue
25 here, and I understand that.

md

126

1 md
2 This information does not appear in any statement,
3 in any written form, no writing anywhere, and there are con-
4 tradictory statements between Klopfer and Bannigan, and
5 Rodriguez clearly indicates they weren't made, but I would
6 indicate to your Honor the taint --

7 THE COURT: Who heard Mr. Gonzalez say it?

8 MR. DAVIS: Do you want the names of all the
9 witnesses?

10 THE COURT: Klopfer said he heard him say the
11 thing about going to California.

12 MR. DAVIS: Your question to me was who testified
13 about the statements. Both Klopfer and Rodriguez heard it
14 perhaps at different times, but they both heard the state-
15 ment. There was one other witness I didn't call today.

16 THE COURT: It was all at the office?

17 MR. DAVIS: The night before in headquarters,
18 and also in Mr. Bannigan's office on the 18th, and --

19 THE COURT: But not in the car?

20 MR. DAVIS: Not in the car.

21 MR. MICHAELSON: I am in an awkward position now,
22 I want to indicate on the record to the Court. I spoke to
23 Mr. Bannigan subsequent to the 18th, and I am perfectly
24 happy to have Mr. Bannigan come here to confirm or deny what
25 I am going to say.

1 md

127

2 I spoke to him around the 25th, I was here in
3 this courthouse approximately the 26th or 25th of November,
4 and I asked Mr. Bannigan whether any statements were made
5 by my client. He said, "The only statement made by your client
6 is here in Government Exhibit 9."

7 I can understand -- in which my client denies
8 anything.

9 I can understand, your Honor, Mr. Bannigan not
10 being aware, and not being -- not remembering a statement
11 not made in his presence by my client, but what is difficult
12 for me to understand, and I don't believe -- I would believe
13 Mr. Bannigan frankly would confirm what I said, because the
14 testimony here is very confusing. Klopfer says he was
15 there, he heard it, but Bannigan might have been out of the
16 room. Rodriguez says Bannigan never left the room, Klopfer
17 left the room.

18 THE COURT: It goes to whether it was made.

19 MR. MICHALES: Going back to another point, I
20 think it is tainted beyond help because after Rodriguez
21 showed him his shield Rodriguez didn't say to my client,
22 "You see I am a police officer now, and anything you said to
23 me in the car I can't use against you because I got that
24 under trickery."

25 THE COURT: I have that point, and I can't agree.

1 md

2 MR. MICHAELSON: Getting back to the other
3 situation, my client had my card there. My card was in his
4 possession, and apparently they are indicating here to this
5 Court -- again it is a matter of credibility -- that they
6 said to my client, "You can call the man," and that my client
7 supposedly said, "I don't know the man."

8 THE COURT: There is no evidence to the contrary
9 on that, really.

10 MR. MICHAELSON: There is no evidence to the
11 contrary, I agree. All we have here -- all the information
12 testified to, including the giving of the rights, including
13 the stuff allegedly taken, none of that is in any of the
14 reports filed by the government.

15 THE COURT: This isn't the occasion to determine
16 whether the statement was made or not, that would be a jury
17 question.

18 MR. MICHAELSON: I agree.

19 THE COURT: It is up to the government, and maybe
20 it will all work to the benefit of the defense if they put
21 that in, and you can go to work impeaching the witness,
22 and we have all seen how effective that can be. So if the
23 government wants to do that, that's up to the government in
24 its wisdom.

25 We have spent a lot of time on that this afternoon,

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129

2 and whether it is worth it will have to remain to be seen.

3 Now, Mr. Panzer, what about you?

4 MR. MICHAELSON: One more comment with respect to
5 the probable cause to arrest.

6 I submit to your Honor there was no probable cause
7 to arrest my client if in fact the arrest of Mr. Ortiz was in-
8 valid. Under the domino theory, everything taken from him
9 was invalid.

10 I would submit to your Honor in this case, a
11 conspiracy case, where the posture is all three are charged
12 with possession, that we would have a right to base our
13 argument -- we would have a standing to base our argument
14 of no probable cause to arrest my client.

15 THE COURT: All right.

16 Mr. Panzer, you are really just riding along,
17 aren't you?

18 MR. PANZER: I am just riding along. I would like
19 to say one thing -- I know time is of the essence -- in support
20 of Mr. Michaelson's argument on this issue of the statement.

21 I think the crucial thing in the statement
22 situation is whether the defendant made a voluntary,
23 intelligent, knowing waiver of his rights, and I think it
24 would be almost impossible for a defendant who is in a car
25 with somebody who is acting as a co-defendant, who is really

1 md

2 a police officer, and tells him, "Well, you can speak to me
3 in Spanish so they don't understand what we are saying, "
4 and then gets admissions from this guy, and then later on
5 confronts him with being a police officer -- how he can make
6 an intelligent waiver at that point, when he doesn't know
7 whether or not what he said in the car could be used against
8 him, I think is impossible to overcome.

9 I think that is a factor your Honor has to weigh
10 in determining whether or not this statement is admissible.

11 THE COURT: Let me put my rulings on the record
12 quickly.

13 The defendant Ortiz moves to suppress all evidence
14 seized at the time of the arrest on November 17, 1975,
15 specifically heroin seized in the automobile and on his
16 person.

17 There is also a motion to suppress certain post-
18 arrest statements, and there is a motion to vacate the search
19 warrant for a safe deposit box.

20 All of the motions of Ortiz really stem from the
21 claim that the arrest was invalid because it was without
22 warrant and without probable cause, and the claim really is
23 that the things that are sought to be suppressed were fruits
24 of the arrest, so the question really all goes to the question
25 of whether the arrest was invalid.

1 md

2 I have phrased it according to what was said at
3 the beginning of the hearing, although I am neglecting an
4 argument made after the hearing which was somewhat
5 different -- that is, that there should have been a search
6 warrant obtained on November 13, 1975, for the search of the
7 car where certain of these items were seized.

8 Defendant Gonzalez moves to suppress all -- now,
9 let's see, Gonzalez moves to suppress --

10 MR. MICHAELSON: The physical evidence.

11 THE COURT: The physical evidence taken from his
12 person at the time he was arrested, and the so-called
13 statements about going to California.

14 MR. MICHAELSON: That's correct.

15 THE COURT: Perez moves to set aside or suppress
16 all that evidence as it would relate to a conspiracy
17 prosecution against Perez. Right?

18 MR. PANZER: He is also charged in the second count
19 with possessing with intent to distribute the amount which
20 is under advisement for your Honor.

21 THE COURT: I am denying all motions for the
22 following reasons.

23 I have heard the evidence gone into quite thoroughly
24 as to the background of the arrest. I reject the contention
25 that there was a lack of probable cause for the arrest of the

1 md

2 three defendants on the 17th of November 1975.

3 Very briefly, the findings are as follows:

4 The government agent found out from an arrested
5 prospective defendant on October 30, 1975, found out or was
6 advised by this defendant, that he had been obtaining heroin
7 from a person known as Felix.

8 He gave a description of Felix. He said where
9 Relix worked, and he said what kind of a car Felix drove,
10 and he said he believed that Felix's sources were two Cuban
11 males from lower Manhattan, and that Felix would go into
12 Manhattan via the Williamsburgh Bridge.

13 Now, the government agents proceeded to check out
14 as best they could what this defendant told them, and in the
15 course of that checking they found out that there was a
16 Felix employed where he was said to be employed, and they
17 found out that his last name was Ortiz, they found out that
18 he did have the kind of car mentioned registered in his
19 name, and they began at a certain point a surveillance of
20 Felix Ortiz and his car, a Buick Electra.

21 He was observed by an agent on November 13, 1975,
22 and at that time one person was with Ortiz, and there was a
23 transfer of a brown paper bag from one car to Ortiz's Buick.

24 However, an arrest was not made at this time for
25 the obvious reason that the agents wanted to carry on further

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2 surveillance in an attempt to become more certain about the
3 nature of the activity, and also to try to locate or observe
4 transactions with the two Cubans.

5 Such a transaction was actually observed, and it was
6 observed for the first time on November 17th, at which time
7 Felix was observed in Manhattan to have received a brown
8 paper bag from two Cubans who got into his car and then
9 left.

10 The agents followed Ortiz until he was about ready
11 to go through a tunnel over to Brooklyn, and at that time
12 they decided to arrest him. They stopped his car, they
13 opened the door to arrest him, and readily found a package
14 later found to contain heroin in the car, and they found
15 further a heroin sample on his person.

16 Ortiz was given advice of his constitutional rights
17 and agreed to cooperate to the extent of advising the agents
18 about his communications that day about the heroin trans-
19 action and the plans for making payment that night to the
20 two Cubans. This led to a government agent following the
21 directions of Ortiz, having conversations with the two
22 Cubans about payment, and the arrest of the two Cubans, who
23 later turned out to be defendants Perez and Gonzalez.

24 Certain items were seized from Gonzalez at the time
25 of his arrest, and there has been a considerable amount of

1 md

2 testimony about what occurred following the arrest of
3 Perez and Gonzalez. It appears that the agent doing the
4 arresting posed after the arrest as a cohort for the time
5 it took to drive to the government office, and some
6 conversation was had at that time, none of which the govern-
7 ment seeks to introduce in evidence.

8 After arriving at the government office, this
9 agent disclosed his identity as a detective, and after being
10 fully apprised of his rights, constitutional rights, it
11 appears that on two occasions, both that night, the night
12 of the 17th, and the next day, the morning of the 18th,
13 Gonzalez made statements to the effect that he could go to
14 California and get heroin to sell to the agents, and he also
15 denied any knowledge of Felix Ortiz.

16 Gonzalez seeks to suppress these statements about
17 going to California, and the exculpatory statement about not
18 knowing Ortiz.

19 I have no doubt that the arrest was made with
20 probable cause, the arrests of all three of these defendants,
21 for the reasons that appear from the facts I have just set
22 out. That to me is quite obvious.

23 One argument that the defendants make is that a
24 search warrant for the automobile should have been obtained
25 on the 13th of November so that a warrant-based search could

1 md

2 be made of the car.

3 I think this is a suggestion that is not founded
4 in the law. It seems to me that under the law the government
5 agents were entitled to go forward with their investigation
6 basically to determine more surely whether Ortiz was involved
7 in a crime and to carry on a more thorough and complete
8 surveillance of his associates acting in connection with
9 him, and it seems to me clear under United States v. Watson,
10 decided by the Supreme Court January 26th of this year, and
11 other cases cited in the Watson case, that there was no
12 violation of the Fourth Amendment in so far as the arrest
13 was concerned or the arrests were concerned in waiting until
14 the 17th and making the arrests as were done.

15 As far as the searches carried on then they were
16 simply searches of the very immediate surroundings of each
17 defendant and the persons of the defendant of the kind that
18 would be necessary to make sure that there were no concealed
19 weapons or that there was no contraband which would disappear
20 and not be secured. This is all that was done and did not
21 require a search warrant to be obtained previously.

22 I further find that by the time that Ortiz and
23 Gonzalez made the statements to the governmental authorities
24 which are sought to be suppressed they had been properly
25 advised of their constitutional rights and they understood

1 md

2 their rights and that those statements were voluntary.

3 I do not accept the argument of Gonzalez that
4 somehow there was a psychological carryover from the
5 so-called deception Rodriguez practiced in the car on the
6 way to the office that made his statements involuntary.
7 I believe they were fully voluntary and that they were made
8 for some purpose best known to Mr. Gonzalez, but certainly
9 voluntary.

10 So the motions to suppress are denied in their
11 entirety.

12 Now, I have a hearing now which I am quite a bit
13 late for, and I have to finish up another trial tomorrow
14 morning. I hoped to get the jury selected tonight, but
15 obviously we haven't been able to do that. If I could
16 commence the trial at two o'clock tomorrow afternoon, that's
17 what I hope to do.

18 MR. PANZER: Once we start the trial at two
19 tomorrow, we will go through?

20 THE COURT: Yes.

21 MR. LOPEZ: I have an application as far as Ortiz
22 is concerned with respect to the trial, but I can make it
23 tomorrow at two o'clock.

24 THE COURT: That is that?

25 MR. LOPEZ: That would be to make a disposition in

1 md

137

2 this case as far as Ortiz is concerned.

3 THE COURT: I think it would be well to know --
4 I think it would help everybody to know exactly who is going
5 on trial and who isn't.

6 MR. DAVIS: It would certainly help me, and may
7 avoid delays tomorrow. I may have to instruct witnesses not
8 to say certain things.

9 THE COURT: How much can we solidify that tonight?

10 MR. PANZER: Judge, if we could perhaps have a
11 conference with you and the United States Attorney we could
12 solidify many things. I don't know if you have the time.

13 THE COURT: I have another matter. Do you want to
14 get in at nine o'clock tomorrow morning?

15 MR. PANZER: If it has to be done we will be here
16 tomorrow morning at nine o'clock.

17 THE COURT: We have two defendants in custody.

18 MR. PANZER: We could solidify some matters, and
19 then if we need the defendants we can do that in the after-
20 noon.

21 THE COURT: I will see you at nine.

22 MR. LOPEZ: At least we should have Ortiz here,
23 because his matter is already solidified.

24 THE COURT: Is he in custody?

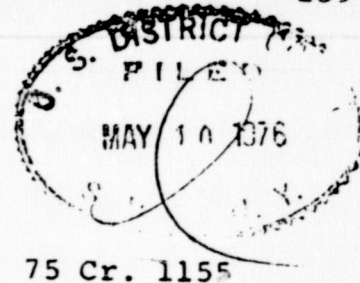
25 MR. LOPEZ: Yes.

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138

THE COURT: Let's have all the lawyers and
defendants here at nine o'clock tomorrow, and I think that
will help us a great deal.

(Adjourned to March 11, 1976, at 9:00 a.m.)



1 MD 1

2 United States of America

3 v.

4 Victoriano Bohez Perez,

5 Felix Ortiz and

6 Rigoberto Gonzalez

March 11, 1976

11:40 a.m.

7 BEFORE:

8 Hon. THOMAS P. GRIESA,

9 District Judge

10 APPEARANCES:

11 Robert B. Wiske, Jr., Esq.,

United States Attorney

12 Frederick T. Davis, Esq.,

Assistant United States Attorney

13 Edward Panzer, Esq.,

14 Attorney for defendant Perez

15 Frank Lopez, Esq.,

Attorney for defendant Ortiz

16 Alvin S. Michaelson, Esq.,

17 Attorney for defendant Gonzalez

18 Also Present

19 Norma Seltzer, Interpreter.

1 MD 2

2 (Case called. All parties r .t.)

3 MR. LOPEZ: Your Honor, most respectfully, I have
4 had conversations with the defendant Felix Ortiz --

5 THE COURT: Mr. Ortiz, why don't you come up
6 by your attorney?

7 MR. LOPEZ: --with the defendant Felix Ortiz, and
8 we have gone over the merits of this case, and at this time
9 he has authorized me to withdraw his previously entered
10 plea of not guilty and has authorized me to enter a plea of
11 guilty to the second count of the indictment, which is
12 the substantive count.

13 I have explained to Mr. Ortiz his various rights,
14 and the waivers that we will have to effect.

15 I have also mentioned to him the fact that he has
16 an exposure on that count, your Honor, as I recall, of
17 fifteen years. There is a fine possibility of \$25,000, and
18 a special parole of three years; that, furthermore, your
19 Honor, I have not received any representations as far as
20 this case is concerned.

21 I have indicated to him that your Honor will
22 hear both sides, your Honor will also read a probation and
23 a presentence report, and at the time of sentence your
24 Honor will be guided accordingly.

25 The only thing that I have reserved for Mr.

MD 3

111

Ortiz, the Court consenting, and I have spoken with Mr. Davis about this matter, is to reserve his rights to appeal the denial of the motion to suppress which your Honor heard yesterday, and to this effect both the government and Mr. Ortiz and myself have entered into a stipulation which is, of course, predicated on the Court's consent, which we have all executed, your Honor, which I am presently turning over to the clerk of the Court for your Honor's perusal.

THE COURT: I will take that.

In other words, Mr. Lopez, what you are saying is that the -- is what you believe and Mr. Ortiz believes are the necessities of the case really arise from the denial of the suppression motions, and if my ruling stands --

MR. LOPEZ: There are no issues here.

THE COURT: -- there are no issues, but you want to reserve your right to appeal.

MR. LOPEZ: That's correct, your Honor.

THE COURT: I think that is perfectly satisfactory to me.

I will execute the -- I will order the -- put a "so ordered" on here.

MR. LOPEZ: Thank you very much. I appreciate that, your Honor.

THE COURT: Okay. And I will return this to

1 MD 4

2 you.

3 Now, I will --

4 MR. LOPEZ: Your Honor, can we make that part of
5 the Court file?

6 THE COURT: Yes, it will be part of the file.

7 THE CLERK: I will file it.

8 THE COURT: Now, may I question Mr. Ortiz?

9 MR. LOPEZ: You certainly may.

10 BY THE COURT:

11 Q Do you understand English, Mr. Ortiz?

12 A Yes, sir.

13 Q Do you understand what I am saying to you, and do
14 you understand what your attorney has said?

15 A Yes, sir.

16 Q Are you satisfied with the representation and
17 advice given to you by your attorney, Mr. Lopez?

18 A Yes, sir.

19 Q How old are you?

20 A Thirty.

21 Q How much education have you had?

22 A I had first year high school.

23 Q You are not under the influence of any alcohol
24 or narcotics today?

25 A No, sir.

1 MD 5

2 Q You are not under any confusion; you understand
3 what we are doing, right?

4 A Yes, sir.

5 Q Are the statements you are making to me made of
6 your own free will under the circumstances and conditions
7 that Mr. Lopez has outlined?

8 A Yes, sir.

9 Q And reserving your right to appeal from the
10 suppression hearing motions, you are willing to plead
11 guilty to this Count 2, right?

12 A Yes, sir.

13 Q You understand that Count 2 charges that on or
14 about November 17, 1975, you and Mr. Perez and Mr. Gonzalez
15 possessed with intent to distribute about 1200 grams of heroin.
16 Do you understand that to be the charge?

17 A Yes, sir.

18 Q I want to ask you some questions to make sure
19 you understand the rights you would be giving up in pleading
20 guilty.

21 THE COURT: Just to save our time, I want the
22 other defendants to listen to these questions through the
23 translator and so that you can perhaps -- perhaps we can
24 respond in a little shorter order when we get to these other
25 defendants. This is not an attempt to be technical about

MD 6

the law, but these are basic rights that you have and you will be giving up.

Q Now, do you understand that you would have a right, if you didn't plead guilty, to go to trial this afternoon before a jury? Do you understand that?

A Yes, sir.

Q Do you understand that the government would have to prove your guilt beyond a reasonable doubt?

A Yes, sir.

Q And the government would have to bring before you and your attorney all the witnesses against you, and your attorney would have the right to cross examine those witnesses--do you understand that?

A Yes, sir.

Q And do you understand that you would not be compelled in any way to incriminate yourself, and you would have the right to sit silent if you so chose? Do you understand that?

A Yes, sir.

Q Now, do you understand that your attorney would have the right to subpoena any witnesses that were available to testify in your favor?

A Yes, sir.

Q Do you understand that if you plead guilty I will

1 MD 7

2 have the right to question you and perhaps put you under
3 oath and that you will have to answer those questions
4 truthfully, subject to penalties for false testimony?

5 A Yes, sir.

6 Q Do you understand that?

7 A Yes, sir.

8 Q Okay.

9 Now, do you understand -- you understood what your
10 attorney said about the possible penalty that could be
11 imposed for this offense?

12 A Yes, sir.

13 Q And you understand that there is no -- that the
14 exact sentence to be imposed is up to me as the Court,
15 and I am not making any commitment or agreement, and I
16 really can't make that decision until I know the whole --
17 all the information I can get about you and your record and
18 the circumstances of the offense, and so forth, and at that
19 time I will decide what the sentence should be.

20 Do you understand that?

21 A Yes, sir.

22 Q And do you understand that -- as I understand it,
23 there is no agreement with the government except that they
24 will drop Count 1 in the event that the proceeding goes
25 forward on the guilty plea and there is no reversal in the
Court of Appeals on the suppression motions.

1 MD 8

2 MR. LOPEZ: That is exactly right, your
3 Honor.

4 Q You understand that, don't you?

5 A Yes, sir.

6 Q All right.

7 I want to know from you what it is you did to
8 commit the offense referred to in Count 2.

9 A As far as the drugs, right?

10 Q Right.

11 A Well, I was, I think Monday the 17th, I was in
12 possession of the heroin found in the car, and I was
13 apprehended by the agents with the possession of narcotics.

14 Q And you were intending to resell those?

15 A Yes, sir.

16 THE COURT: One thing that confused me. How do
17 you handle the appeal? Suppose you take the appeal from the
18 suppression motion? How is that handled if I am reversed
19 on that? Then I guess all these proceedings and admissions
20 and the whole thing is just cancelled out; is that right?

21 MR. LOPEZ: Yes.

22 MR. DAVIS: The provision of the stipulation is
23 he will be allowed to withdraw his guilty plea.

24 THE COURT: And all statements made?

25 MR. DAVIS: The statements made on the guilty plea

1 MD 9

2 are not admissible under Rule 410 of the Rules of Evidence.

3 THE COURT: We have kind of an alternative path
4 here. I want to make sure that you are going to be free
5 and full in your disclosure to me and to the probation
6 officer. That's the only way I can get any help in knowing
7 what sentence to impose. Right now that is in your best
8 interests as well as in the best interests of the Court.

9 DEFENDANT ORTIZ: Yes, sir.

10 THE COURT: I guess what this means is if you
11 appeal and the Court of Appeals reverses me then all of these
12 statements are inadmissible. Right?

13 MR. LOPEZ: That's correct.

14 THE COURT: Both to me on the guilty plea and
15 to the probation officer.

16 MR. LOPEZ: That's correct, your Honor.

17 THE COURT: All right. That's my understanding,
18 and I think that's the only fair way to handle it, and you
19 should realize that, and you should talk perfectly freely
20 and candidly and fully to the probation officer, because it
21 is the only way that this proceeding is going to mean
22 anything.

23 Q Do you understand that?

24 A Yes, sir.

25 THE COURT: And you will so advise him, right?

MD 10

148

MR. LOPEZ: I already have, your Honor.

THE COURT: I think this is a sufficient basis for the plea, is it not?

MR. DAVIS: Yes, I think so.

THE COURT: The Court accepts the guilty plea on the part of Mr. Ortiz, and we will set a sentencing date in a moment.

Will you come down?

Mr. Michaelson and Mr. Gonzalez, will you step forward? And you will have to bring the interpreter with you.

BY THE COURT (Through the Interpreter):

Q How old are you, Mr. Gonzalez?

A I am 37 years old.

Q Do you understand what we are doing here today?

A Through my interpreter.

Q And are you acting of your own free will?

A Yes, sir.

Q And have you consulted earlier with your attorney, Mr. Michaelson?

A Yes, sir.

Q And are you satisfied with his advice to you?

A Yes, sir.

Q Did you hear me outline to Mr. Ortiz the nature

1 MD 11

2 of the charge and the rights you would have to a jury trial
3 if you did not plead guilty?

4 A Yes, sir.

5 Q And you understand the nature of the charge,
6 and you understand the rights you would have that I
7 outlined?

8 A Yes, sir.

9 Q Do you understand that the maximum penalty for
10 the offense is fifteen years in prison and \$25,000 fine, and
11 three years special parole?

12 A Yes, sir.

13 THE COURT: I am not sure you mentioned the
14 special parole, Mr. Lopez.

15 MR. LOPEZ: Yes, I did, and Mr. Ortiz knows.

16 THE COURT: And you understand that, do you not,
17 Mr. Ortiz?

18 DEFENDANT ORTIZ: Yes, sir.

19 Q Do you understand, Mr. Gonzalez, that the exact
20 penalty to be imposed is up to me to decide, and that I make
21 that decision only after I have a complete report about
22 you, about your background, and everything that I can learn
23 about the circumstances of this situation?

24 A Yes, sir.

25 Q And I am unable to make any commitments or

150

1 MD 12

2 agreements now as to exactly what that sentence would be;
3 do you understand that?

4 A Yes, sir.

5 Q Do you understand that I am entitled to ask you
6 questions about this offense, and you are required to
7 answer, and if you don't answer truthfully you would be
8 subject to penalties for not answering truthfully?

9 A Yes, sir.

10 THE COURT: Have any agreements been made between
11 you and the government? Either you or your attorney can
12 answer.

13 MR. MICHAELSON: The only agreement that I am aware
14 of is that the other count would be dismissed at the
15 appropriate time -- I believe that's Count 1 -- and that --
16 I believe that we are also given the same right as Mr. Ortiz
17 to take an appeal on the evidence that came in yesterday,
18 based upon the evidence and based upon the stipulation.

19 That's what Mr. Davis indicated to me previously.

20 MR. DAVIS: As to the stipulation to the appeal
21 I have not drawn up a formal stipulation. I do not think
22 one is necessary. In fact, there are cases where there was
23 no mention of right to appeal.

24 THE COURT: In other words, you have the similar
25 rights as worked out in the written stipulation with Mr.

1 MD 13

2 Ortiz, and you agree that Mr. Gonzalez and Mr. Perez have
3 those same rights?

4 MR. DAVIS: Precisely.

5 As to the agreement as to the dismissal of the
6 other count, I indicated clearly to Mr. Michaelson the
7 government is perfectly willing to allow him to plead to
8 one count on the condition Mr. Gonzalez states that he is
9 willing to sit down and be forthcoming with the government
10 as to what he knows about the business. If he states that
11 now I am perfectly willing to go ahead.

12 MR. MICHAELSON: It was my understanding Mr.
13 Davis was going to subpoena my client before a grand jury.
14 That's what he told me. That's the thing he mentioned.
15 And I indicated my client indicated to me he would testify
16 truthfully before the grand jury.

17 That's the only commitment I made.

18 THE COURT: Are you willing to do that, testify
19 before a grand jury, as to what you know?

20 MR. GONZALEZ: Yes, sir.

21 MR. DAVIS: That's fine, your Honor.

22 Q You describe in your own words what it is you did
23 to commit this offense referred to in the second count.

24 MR. MICHAELSON: I think, your Honor, we ought to
25 indicate that is the possession with intent to distribute.

1 MD 14

2 A Your Honor what is it you would like to know?

3 Q Well, I want to know -- why don't you
4 question him, Mr. Michaelson? I think that's easier.

5 BY MR. MICHAELSON:

6 Q Mr. Gonzalez, on this particular day, November
7 17, 1975, did you have a package in conjunction with your
8 brother?

9 A Yes.

10 Q And did you know what was in that particular
11 package?

12 A Yes, sir.

13 Q And did you assist in giving that package to
14 Mr. Ortiz?

15 A Yes, sir.

16 Q On November 17th?

17 A Yes, sir.

18 BY THE COURT:

19 Q And you knew that was heroin, right? You
20 knew that was heroin?

21 A Yes, sir.

22 MR. MICHAELSON: Is that sufficient?

23 THE COURT: I think that is. That is
24 sufficient for the guilty plea.

25 If you could sit down, I will question Mr.

1 MD 15

2 Perez for a moment.

3 Is Mr. Perez more comfortable sitting down or
4 standing up?

5 MS. SELTZER: He would like to stand.

6 THE COURT: All right.

7 MR. PANZER: Your Honor, just to cut the matter
8 short, I join all the applications made by prior counsel
9 with respect to the appeal, and your Honor indicated that --

10 THE COURT: That is understood.

11 MR. PANZER: Your Honor indicated that on the
12 record.

13 Prior to today, on Indictment 75 Cr. 1155, Mr. Per
14 entered a plea of not guilty. Today he wishes to change
15 that plea to guilty to Count 2.

16 I have explained to him possible maximum
17 sentence could be fifteen years, \$25,000 fine, and if a
18 prison term were imposed a special condition of parole
19 for at least three years.

20 BY THE COURT (Through the Interpreter):

21 Q Do you understand all of that, Mr. Perez?

22 A Yes, sir.

23 MR. PANZER: He is forty years old. Most of
24 his education has been in Cuba, and he is prepared to
25 plead.

1 MD 16

2 THE COURT: Mr. Perez, did you hear the
3 questions I asked to Mr. Ortiz about the right to a jury
4 trial, and so forth?

5 DEFENDANT PEREZ (Through interpreter): Yes, sir.
6 BY THE COURT:

7 Q You understand you would be giving up those
8 rights by pleading guilty?

9 A Yes, sir.

10 Q And you understood me outlining the nature of
11 the charge in Count 2?

12 A Yes, sir.

13 Q All right.

14 Now, are you acting of your own free will now?

15 A Yes, sir.

16 Q Do you understand that I would have a right to
17 question you about the offense, and you would be obligated
18 to answer truthfully questions?

19 A Yes, sir.

20 Q You would be required to answer truthfully
21 subject to penalties for not answering truthfully.

22 A The truth always.

23 Q Do you understand that the exact sentence to be
24 imposed is up to me to decide, and I will only decide that
25 after I get a full report about you?

MD 17

155

A Yes, sir.

Q You tell me -- and if it is more convenient, Mr. Panzer, to have you question Mr. Perez I just need to have a statement of what he did.

MR. PANZER: I think it would be more convenient if I did, and if I may I will proceed.

THE COURT: Okay.

BY MR. PANZER:

Q Mr. Perez, on November 17, 1975, in the borough of Manhattan, New York City, did you have a package which contained heroin?

A Yes, sir.

Q And did you give that package to Mr. Ortiz?

A Yes, sir.

MR. DAVIS: I hate to be a stickler, your Honor, but unless he indicates that he knew it was heroin --

MR. PANZER: He said it was.

BY THE COURT:

Q Did you know this was heroin?

A Yes, sir.

THE COURT: Is there anything else?

MR. DAVIS: No. That's fine.

THE COURT: The Court accepts the plea.

Why don't you go back, Mr. Perez, and the

1 MD 18

156

2 interpreter.

3 I would like to propose April 13th as a
4 sentence date, 9:30 a.m.

5 MR. MICHAELSON: If the Court pleases, I may
6 have a problem with that day. I have a matter scheduled
7 in the United States District Court --

8 THE COURT: You suggest a date.

9 MR. MICHAELSON: I have a trial scheduled on
10 the 13th.

11 THE COURT: Where?

12 MR. MICHAELSON: In California. I could
13 probably be here on the 15th.

14 MR. PANZER: That will present a problem for
15 me. That's Passover. I might be away that week. I was
16 going to suggest, subject to your Honor's approval,
17 April 23.

18 THE COURT: I think that is a little late.
19 What about the 19th?

20 MR. PANZER: I am starting a trial on the
21 19th before Judge Dooling in the Eastern District. If
22 your Honor wants to take the sentence late in the
23 afternoon, that would be all right with me.

24 MR. MICHAELSON: That would be satisfactory to
25 me.

MD 19

THE COURT: What time could you make it?

MR. PANZER: Five o'clock.

THE COURT: You are not free the 12th, Mr. Michaelson?

MR. MICHAELSON: My problem is this --

THE COURT: Let's not string this along. I will take it five o'clock April 19th in this room.

MR. MICHAELSON: I trust there will be no problem, but the 12th would have been a problem since I would have had to be in California on the 13th.

THE COURT: April 19th in this room at five o'clock.

MR. DAVIS: The only remaining issue, your Honor, is that of bail. Mr. Perez --

THE COURT: Wait a minute. (Pause)

Okay, what's your problem?

MR. DAVIS: Mr. Perez and Mr. Ortiz are both in jail on \$35,000 security in lieu of \$35,000 in cash. Mr. Gonzalez has met that and has paid \$35,000, I believe, by security.

It is my position, your Honor, that all three of these people were involved in a fairly, in fact quite substantial heroin transaction to which they have now pleaded guilty. Although the sentence is entirely up to

MD 20

your Honor, I think the chances of them getting a jail term is very substantial and I think all three of them should be remanded to start serving their sentences.

MR. MICHAELSON: My client lives in California. He knew when he came here that he was going to be --

THE COURT: I am not going to change the bail conditions. Bail conditions will remain.

MR. MICHAELSON: Thank you very much.

THE COURT: I just want to say that I -- look, I say to you, Mr. Gonzalez, that I am -- the reason I am allowing the bail conditions to remain, even after you have pleaded guilty, is because you came to court when you were required yesterday.

Now, I just can't emphasize to you enough that it is in your interests to be available for whatever you are needed: with the probation officers, with the grand jury, or whatever. This is essential for you, and if you skip out you, as far as any life, at least in this country, any chance of making a good showing to the Court, it's gone.

I think you understand that, and I just want to emphasize that to you, and I want you to emphasize it to him, Mr. Michaelson.

MR. MICHAELSON: I have.

MD 21

150

THE COURT: Because I am trusting you, and I do not want you to violate my trust.

MR. MICHAELSON: Thank you.

THE COURT: All right.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Murray Neustadt
Official Court Reporter
U. S. District Court

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Donald Alfred Klopfer	7	48	72	74
Angel Rodriguez	75	88		

EXHIBIT INDEX

<u>Government</u>	<u>Identification</u>	<u>In Evidence</u>
1, 2		32
3 through 7		47
8		48
9, 3-A, 3-B, 10		113
11		114

U.S. COURT OF APPEALS:2nd CIRCUIT

THE UNITED STATES OF AMERICA,

Defendant

- against -

FELIX ORTIZ,

APPELLANT.

Index No.

76-1302

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Victor Ortega,

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York

That on the 21st day of July 1976 at St. Andrews Plaza

deponent served the annexed

Appendix

upon

Robert Fiske, United States Attorney

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 21st
day of July 1976

Robert T. Brin

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977